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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-6740

ROBERT BULLINGTON, Petitioner

vs.

STATE OF MISSOURI, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSOURI

Richard H. Sindel
Attorney for Petitioner
15A N. Meramec, Suite 200
Clayton, Missouri 63105

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SUPREME COURT OF THE UNITED STATES

ROBERT BULLINGTON, Petitioner	)	
vs.	)	No. _____
STATE OF MISSOURI, Respondent	)	

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

TO: THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Robert Bullington, the petitioner herein, prays that a Writ of Certiorari issued to review the judgment of the Supreme Court of the State of Missouri, entered in the above entitled cause, on February 11, 1980. Petitioner's Motion for Rehearing was denied on March 11, 1980.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Missouri is cited as 594 S.W.2d 908 (Mo. 1980). Being Appendix B attached hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Missouri making its Rule of Prohibition requested by the State of Missouri absolute on February 11, 1980. A timely Motion for Rehearing was denied on March 11, 1980. The jurisdiction of this Court is envoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

This cause presents the following questions of interest and importance which warrant and necessitate the attention of this Court, to-wit:

A. Is it constitutionally permissible under the principals of double jeopardy and collateral estoppel for the State of Missouri to

seek the death penalty upon the retrial of a murder case wherein:

(a) The jury at the penalty phase of the first trial was instructed to assess punishment at death only upon a finding beyond a reasonable doubt of the existence of certain aggravating circumstances enumerated in the Statute 565.012.2 R.S.Mo. 1977; and

(b) The jury assessed petitioner's punishment at life imprisonment only; and

(c) The State has advised the Missouri Supreme Court that the aggravating circumstances and evidence at the second trial would be identical to that presented to the jury at the first trial.

B. Can the State of Missouri seek the sentence of death at petitioner's second trial when the jury at his first trial assessed punishment against him at life imprisonment without violating the constitutional principals that the sentence at petitioner's second trial cannot be excessive and disproportionate to the sentence imposed at his first trial and the sentence of death cannot be imposed in an arbitrary and capricous manner. Gregg v. Georgia, 428 U.S. 153 (1976) and Furman v. Georgia, 408 U.S. 288 (1972).

C. Can the State of Missouri seek the death penalty against petitioner when the aggravating circumstances pled by the State of Missouri in its Notice of Evidence in Aggravation, to wit:

> The offense was committed by a person who has a substantial history of serious assaulted convictions;
> and
> The offense was outragously or wantonly vile, horrible or inhuman in that it involved depravity of mind;

are unduly vague and overbroad in violation of the due process clause of the XIV Amendment to the Constitution of the United States and Godfrey v. Georgia, No. 78-6899, decided on May 19, 1980.

D. Does permitting the State of Missouri to seek the penalty of death at petitioner's retrial, after the jury at his first trial returned a sentence of life imprisonment only, needlessly chill the exercise of his right to trial by jury at his second trial as guaranteed him by the V, VI, and XIV Amendments to the United States Constitution and the exercise of his right to seek a trial by a jury reasonably representative of the community.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Fifth, Sixth, Eight and Fourteenth Amendments to the Constitution of the United States. The statutes involved are ■■557.036.2, 565.001, 565.006, 565.008 and 565.012 of the Revised Statutes of Missouri, 1977.

STATEMENT OF THE CASE

On December 9th, 1977, an indictment was filed in the Circuit Court of St. Louis County, State of Missouri, charging the petitioner herein with Capital Murder, a crime punishable by death or life in prison in the State of Missouri. He was also charged therein with kidnapping, armed criminal action, burglarly first degree and two counts of flourishing a dangerous and deadly weapon, On July 7, 1978, the State of Missouri filed its Notice of Evidence in Agrravation advising the Court and the petitioner herein of its intention to seek the death penalty if there was a conviction of Capital Murder.

On October 11, 1978, petitioner was found guilty on all counts and on October 12, the second stage of the bifurcated trial was commenced to consider punishment on the charge of Capital Murder. The jury was instructed that pursuant to 565.012.2 R.S.Mo. they could return a sentence of death only if the State proved beyond a reasonable doubt the existence of at least one of two alleged aggravating circumstances. After presentation of evidence, argument and due deliberation the jury returned their verdict assessing petitioner's punishment at life imprisonment. Petitioner thereafter filed a timely Motion for a New Trial and on February 13, 1979, the trial court granted petitioner's motion based on State of Missouri v. Duren, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), and ordered a new trial. Thereafter, the State of Missouri filed its Notice of Evidence in Aggravation identical to that filed in the first trial. On March 12, 1979, the petitioner filed his Motion to Strike Plaintiff's Notice of Evidence in Aggravation and his Motion to Exclude from Trial Evidence in Aggravation of Punishment contending that the State's Notice should be quashed for the following reasons:

> That the plaintiff's Notice of Evidence in Aggravation, if not stricken, places defendant twice in Jeopardy in violation of the Fifth and Fourteenth Amendments to the Constitution

of the United States and Article 1, Section 19 of the Constitution of Missouri for the reasons that the determination of punishment has been made, and was not affected by the trial courts granting defendant's Motion for New Trial; that said determination of punishment constitutes a conviction of the offense of capital murder punishable by life imprisonment which is a lesser included offense of capital murder punishable by death; and that conviction of the offense of capital murder punishable by life imprisonment constitutes an acquittal of the offense of capital murder punishable by death.

That the plaintiff's Notice of Evidence in Aggravation and any presentment of said evidence is subject to the Doctrine of Collateral Estoppel in that the issue of punishment and aggravating circumstances considered in imposing said punishment has been previously litigated and imposed and remains undisturbed by the trial court's granting defendant's Motion for New Trial. Any admission of said evidence would lie in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 19 of the Constitution of Missouri.

Defendant further states that the plaintiff's Notice of Evidence in Aggravation if permitted to stand and the presentment of said evidence at defendant's new trial would: Have a chilling effect on defendant's right to appeal in that a determination of punishment has been made; subject defendant to relitigation of this identical issue and therefore effectively hamper and chill his rights to seek that relief guaranteed him by law; deny defendant his right to effective assistance of counsel; deny defendant due process of law and equal protection of the law; subject defendant to cruel and unusual punishment, all in violation of the Fifth, Sixth, Eight and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 10, 18(a), 19, and 21 of the Constitution of Missouri.

The Prosecutor has not advised defendant or the Court by said Notice of Evidence in Aggravation of any evidence or grounds not available or presented at the first trial.

On May 10, 1978, the trial court announced its intention to sustain petitioner's Motion to Strike and the State sought a Writ of Prohibition in the Missouri Court of Appeals, Western District. The State's request was denied by the Court of Appeals. Thereafter, the State sought a preliminary Writ of Prohibition from the Missouri Supreme Court which was issued in the Court on February 11, 1980, overruling all of petitioner's grounds as stated aforesaid, ordering the Writ to be made absolute.

REASONS FOR GRANTING THE WRIT

There are at least six compelling reasons why this Court should grant an issue of Writ of Certiorari to the Supreme Court of the State of Missouri in this case.

First, the retrial of petitioner in a proceeding wherein the death penalty is sought and litigated is specifically prohibited by the constitutional principals of double jeopardy and collateral estoppel. The immunities guaranteed to the petitioner by these principals make it imperative that the Court act prior to the trial, to prevent the wrong of forcing the petitioner to again risk his life at trial.

Second, this Court should act before the second trial to insure to the petitioner his right to an impartial and unbiased jury that has not been tainted nor its ranks reduced by death-qualifying them pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968).

Third, the issues before the Court are of such magnitude and importance that if the petitioner were to be convicted the questions presented for review would again be before the Court for final determination. The Constitution, justice and judicial efficiency demand that the Court grant the Writ of Certiorari and act on the question presented for review rather than postponing a decision.

Fourth, making a Rule of Prohibition absolute by the Supreme Court of the State of Missouri, is without question a final judgment which is appealable under 28 U.S.C. 1257(3) and as such is ripe for review.

Fifth, at present there exists between the various States substantial conflicts as to how the issues presented herein and the supporting constitutional principals hereinafter cited and relied on should be applied to similar situations as presented in the case at bar. Where the States disagree as to how to apply identical principals of constitutional law, especially under circumstances wherein a man's life is in question and where the law itself is subject to multiple interpretations by the various justices of this Court, it is imperative and necessary that the Court direct the States within prescribed limitations as to how the various constitutional principals involved should be applied in this and similar cases.

Sixth, this Court should not compel the petitioner to undergo the

emotional and mental torment of facing a sentence of death by refusing to grant certiorari. Under the facts presented herein a second trial requiring this petitioner to risk his life would be unduly harsh, cruel and unusual treatment and could deprive the petitioner of his right to effective assistance of counsel during the guilt phase of the trial.

ARGUMENT

THE RETRIAL OF PETITIONER IN A PROCEEDING WHEREIN THE DEATH PENALTY IS SOUGHT AND LITIGATED IS SPECIFICALLY PROHIBITED BY THE CONSTITUTIONAL PRINCIPALS OF DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL.

The immunities guaranteed to the petitioner by these principals make it imperative that the Court act prior to the trial, to prevent the wrong of forcing the petitioner to again risk his life at trial.

The Court has long recognized and held that the primary purpose of the double jeopardy clause of the Fifth Amendment is not to protect those defendants who have been convicted a second time unjustly but to prevent the prosecution of those defendants a second time unjustly. U.S. v. Wilson, 420 U.S. 332 (1975). It is just this risk of second trial that petitioner seeks to avoid. The substantial nature of the risk of a second trial and the cruelty in ignoring the risk have been well understood and have formed a body of law authored by this Court. In Breed v. Jones, 421 U.S. 519, 528 (1975) the Court stated: "...the risk to which the term jeopardy refers is that traditionally associated with actions intended to authorize criminal punishment to vindicate public justice...Because of its purpose and potential consequences, and the nature and resources of the State, such proceeding imposes heavy pressures and burden - psychological, physical and financial on a person charged. The purpose of the double jeopardy clause is to require that he be subject to the experience only once for the same offense." Clearly, only this Court can now prevent the complete erosion of the immunity afforded petitioner by the double jeopardy clause of the Fifth Amendment.

"A defendant who is required to await the completion of allegedly duplicative proceedings against him before being allowed to vindicate his double jeopardy has already and inescapably lost to a large degree the protection which the right was meant to afford him. It is in just such instances that the Supreme Court has recognized the propriety of interlocutory review." U.S. v. Alessi, 536 F.2d 978, 980 (1976). Inaction by this Court unquestionably means that petitioner's double jeopardy rights will be inescapably lost and substantial and severe prejudice will undoubtedly result.

> The...plea of double jeopardy is not a defense in the ordinary sense...the plea of double jeopardy...is an assertion of a constitutional grant of immunity. Therefore, it is more than a defense. The act which terminates the first trial germinates into life the dorment seed of constitutional immunity...the guarantee is that the person shall not be subject to the risk of a second trial...the immunity protection against being subjected to another trial - any part of another trial... Therefore reason and logic indicate that it is permissible to raise the plea of double jeopardy, if a person chooses, before the commencement of another trial and in whatever form is proper and available. McCabe v. Bronx County Court, 199 NYS2d 241 (1961), 94 ALR2d 1048, 1061.

Although petitioner has at every stage of the proceeding raised his argument and has succeeded in convincing the trial Judge, the Court of Appeals and two of the Justices of the Supreme Court of the State of Missouri, the only forum available for him at the present to shield him from the violation of his constitutional rights is this Court.

Any doubt, or reservation as to the propriety of reviewing decisions by lower courts applying the principals of the double jeopardy clause to foreclose and forbid a second trial have been completely and effectively removed by the Court's decision in Abney v. United States, 431 U.S. 651 (1977). Abney was charged with Conspiracy and Attempt to Violate the Hobbs Act under a single count indictment. He challenged the indictment as duplicitious and the District Court, in refusing to dismiss the indictment, required the Prosecuting authority to prove all elements of both offenses. Thereafter, the defendant was found guilty by the jury and appealed the conviction which was reversed by the Court of Appeals on evidentiary

grounds. In the order of reversal, the Court of Appeals directed the Prosecutor to elect between conspiracy and the attempt charges. The Government elected for conspiracy and plaintiff moved to dismiss on double jeopardy grounds. The Government argued that the Court of Appeals had no jurisdiction to hear the appeal from the trial court's ruling since the Motion to Dismiss was not a final decision within the meaning of 28 U.S.C. 1291. The Court, in an opinion written by Chief Justice Burger, while acknowledging the policy against piecemeal appeals recognized that double jeopardy motions and pretrial orders "fall within the so called 'collateral order' exception to the final judgment rule." The Court referred to three criteria to determine whether or not the claimed order is a final decision or a final decree under 28 U.S.C. 1257. First, has the order fully disposed of the Federal question raised; "in no sense did it leave the matter 'open, unfinished or inconclusive'." Second, "The decision was not simply a 'step toward final disposition of the merits of the case (which would) be merged in final judgment'; rather it resolved an issue completely collateral to the cause of action asserted." Finally, that "the decision had involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment; hence to be effective appellate review had to be immediate." page 659. The Court concluded that an order denying a Motion to Dismiss an indictment on double jeopardy grounds falls within the "'small class of cases' that Cohn has placed beyond the confines of the final judgment rule", page 659. As in Abney there can be no doubt that the order of the Supreme Court of the State of Missouri meets the criteria established by the Court and constitutes a complete, formal, and final rejection of petitioner's double jeopardy claim. Mr. Bullington has no additional or further steps that he can take in an effort to avoid the trial he claims is barred by the Fifth Amendment. By his Motion and by this Application and Petition he is "contesting the very authority of the Government to hail him into Court to face trial on a charge against him" Abney supra, page 659. It is the risk of trial that is to be avoided.

It is not sufficient to vacate an erroneous conviction after trial for it is mandated by the Fifth Amendment that it is the trial itself that is prohibited.

> "...Because of the focus on the 'risk' of conviction the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interest wholly unrelated to the propriety of any subsequent conviction." Abney, supra.

Even if Mr. Bullington is acquitted, convicted and sentenced to life imprisonment or a conviction is ultimately reversed on double jeopardy grounds, he has been forced to endure the trial prohibited by the Fifth Amendment. Petitioner has no choice; if he is to avoid exposure to being twice placed in jeopardy and thereby enjoy the full privileges and protections of the double jeopardy clause the decision of the Supreme Court of Missouri must be reviewed before the subsequent exposure occurs. The imperative nature of plaintiff's plea for consideration by this Court cannot be undermined or diluted by a claim from the State the principals annunciated in Abney supra, do not include the Doctrine of Collateral Estoppel. The incorporation of this Doctrine within the protection and immunities afforded by the Fifth Amendment double jeopardy clause was made complete in Ashe v. Swenson, 397 U.S. 436 (1970). Furthermore, in Harris v. Washington, 404 U.S. 55, 56, wherein the defendant had raised the issue of collateral estoppel prior to the second trial following an acquittal at the first, the Court held that "since the State Courts have finally rejected a claim that the constitition forbids a second trial of this petitioner, a claim separate and apart from the question whether petitioner may constitutionally be convicted of the crime with which he is charged, our jurisdiction is properly invoked under 28 U.S.C. 1257."

THE COURT SHOULD ACT BEFORE THE SECOND TRIAL TO INSURE TO THE PETITIONER HIS RIGHT TO AN IMPARTIAL AND UNBIASED JURY THAT HAS NOT BEEN TAINTED NOR ITS RANKS REDUCED BY DEATH-QUALIFYING THEM PURSUANT TO WITHERSPOON v. ILLINOIS, 391 U.S. 510 (1968).

If the petitioner were forced to undergo trial wherein the death penalty was improperly sought for the grounds hereinafter stated, the jury pursuant to Witherspoon v. Illinois, supra. would have been "death-qualified". If petitioner's contentions are correct, i.e., the State cannot seek the death penalty, the jury would have no role in the sentencing phase of the trial unless they found him guilty of an offense other than capital murder. It would accordingly be improper to voir dire the jurors concerning their personal beliefs and abilities to impose a death penalty. Although the issue of such a death-qualified jury has never been resolved in Witherspoon, supra., the Court suggested that competent evidence establishing that jurors not opposed to the death penalty are less than neutral with respect to guilt would be sufficient to show the selected jury would not be constitutional. 391 U.S at 520 n. 18. There exists many studies that now claim to establish that the voir dire examination of Venireman regarding imposition of the death penalty or "death-qualifying" the jury within the limits of Witherspoon, produces a jury also uncommonly willing to convict a man of an offense punishable by death. NEW DATA ON THE EFFECT OF A "DEATH-QUALIFIED" JURY ON THE GUILT DETERMINATION PROCESS, George L. Jurow, 84 Harv. L.Rev. 567 (1971); ON THE CONVICTION PRONENESS AND REPRESENTATIVENESS OF THE DEATH-QUALIFIED JURY: AN IMPERIAL STUDY OF COLORADO VENIREMAN, Edward J. Bronson, 43 U. Col. L. Rev. 1 (1970).

This Court is not faced with the question, left unsettled by Witherspoon, of whether any jury "death-qualified" in voir dire can in neutrality determine a defendant's guilt. The issue before the Court is a more narrow one; whether the jury has any role in sentencing following petitioner's sentence of life imprisonment at the first trial because death or life in prison are the only possible sentences that petitioner could receive. If it is determined that he cannot be resentenced to the penalty of death, the jury cannot properly be voir dired regarding that punishment.

The improper exclusion of even a single Venireman violates petitioner's right to a properly paneled jury. In Davis v. Georgia,

429 U.S. 122 (1976) the Court made it clear that regardless of how many jurors with conscientious or religious scruples against the death penalty are permitted to serve on a jury, the petitioner's death sentence may not constitutionally be executed if a single member of the Venire has been excluded in violation of the Witherspoon standard. Recognition by the Courts of the importance of assuring to the defendant a jury that is unbiased and unprejudiced would prohibit the State from death-qualifying a jury unless the death penalty could be properly sought. As it is petitioner's contention that this is not possible in this case, it would be a grievous and uncorrectable error to subject him to a trial wherein the jury was advised the death penalty was possible and Venireman were disqualified because of their personal beliefs concerning the death penalty. (Over twenty Venireman were struck for cause after being questioned by the State about their ability to impose a sentence of death at petitioner's first trial). Reversal of a sentence of death by an Appellate Court could not correct the error committed and a third trial would be required to insure the petitioner of a fair and properly impaneled jury. Clearly, the jury should only be death-qualified in those cases where death by execution is a possible or probable result. The strict standard of Witherspoon, and the resultant scrutiny on the part of the Courts to determine that its principals are not violated or disturbed in any way is readily apparent from a review of the cases enforcing those principals. Matthis v. New Jersey, 403 U.S. 496 (1971); Beck v. Illinois, 403 U.S. 946 (1971); Wayne v. Texas, 403 U.S. 946 (1971); Wigglesworth v. Ohio, 403 U.S. 947 (1971); Quintana v. Texas, 403 U.S. 947 (1971); Childs v. North Carolina, 403 U.S. 948 (1971); Jaggers v. Kentucky, 403 U.S. 946 (1971); Harris v. Texas, 403 U.S. 947 (1971), Adams v. Washington, 403 U.S. 947, (1971).

THE ISSUES BEFORE THE COURT ARE OF SUCH MAGNITUDE AND IMPORTANCE THAT IF THE PETITIONER WERE TO BE CONVICTED THE QUESTIONS PRESENTED FOR REVIEW WOULD AGAIN BE BEFORE THE COURT FOR FINAL DETERMINATION.

As indicated above, if the Court refuses to issue a Writ of

Certiorari to the Supreme Court of the State of Missouri, undoubtedly these same issues will be argued again if a conviction were to result. Barring a substantial change in the Supreme Court of Missouri's position or in the composition of the Court results similar to that cited herein could be readily expected. At this appeal petitioner would vigorously argue, as he is now, that allowing the State to proceed in its request for the death penalty severely prejudiced his right to a fair and impartial trial in front of a properly impaneled jury; hindered and unfairly influenced his trial strategy; seriously effected the assistance he was able to receive from counsel; prejudiced him in the eyes of the jurors; and subjected him to a second proceeding which was neither legal nor warranted. Obviously, the possibility exists that the jury would determine that petitioner should again be sentenced only to life imprisonment. Then, the Courts would need to determine whether or not allowing the jury to consider imposition of the death penalty; allowing the jury to be death-qualified; forcing the petitioner to make strategy decisions and to possibly waive trial by jury; and allowing the jurors a roving commission as to sentence could have or would have prejudiced the petitioner at the guilt phase of the trial. If the petitioner were able to convince the Court that such a prejudice did result and that the Supreme Court of Missouri was in error in making the Rule of Prohibition absolute and overruling the trial court and the Court of Appeals then, unquestionably, the petitioner would be entitled to a third trial. The second trial would have been a complete and unnecessary waste of time and energy in a judicial system already troubled by a congested docket. Mills v. Alabama, 384 U.S. 214 (1966). While there is obviously no way to determine how the Supreme Court of Missouri would rule if the petitioner were convicted and sentenced to death, under Missouri Statutes they would have exclusive jurisdiction and a repeat performance could be expected. Refusing to hear the questions herein presented would only result in an inexcusable delay that could seriously hamper both the State's and petitioner's right to fair and impartial trials.

Immediate rather than delayed review is the best way to avoid "the mistress of economic waste to delay justice" Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 at 124. In Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 483 (1975), the Court recognized that there are situations where the State Courts have made a final determination on the Federal issue and yet, there remain further proceedings pending in which the parties seeking review may prevail on the merits. This is true in the case at bar as petitioner may obviously be found not guilty of the offense of capital murder or may convince the jury at the guilt phase of the second trial that he should again be sentenced to life imprisonment. However, in this case, as in the Cox case, reversal of the State Court on the Federal issue would be preclusive of any further litigation during the penalty phase. Rather than delay its ruling and perhaps seriously effect a portion of the second trial, the Court should grant certiorari and review the issues involved. If the Missouri Supreme Court was wrong in its decision, there should be no guilt phase at all, life being the only possible sentence. Delaying the decision of petitioner's claim until after trial will "leave unanswered an important question" Cox at 485. See also Brady v. State of Maryland, 373 U.S. 83 (1963).

THE MAKING OF A RULE OF PROHIBITION ABSOLUTE BY THE SUPREME COURT OF THE STATE OF MISSOURI, IS WITHOUT QUESTION A FINAL JUDGMENT WHICH IS APPEALABLE UNDER 28.U.S.C. 1257(3) AND THAT SUCH IS RIPE FOR REVIEW.

Action by the Supreme Court of a state on a Writ of Prohibition, either denying or granting same, under the rule of Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 is to be considered an independent suit in relation to the criminal prosecution and the judgment of the Court finally disposing of such a suit is a final judgment within the meaning of 28 U.S.C. 1257. Rescue Army v. Municipal Court, 331 U.S. 549 (1947). In State of Missouri v. Taylor, 266 U.S. 200 (1924), although the Writ was denied, Justice Brandeis speaking for the Court stated: "The suggestion was made at the argument that this Court is without jurisdiction because the judgment below was not final. The contrary is settled.

The Application for a Writ of Prohibition is an independent advisary suit which was finally determined by the judgment under review." In Michigan Cent. R. Co. v. Mix et al, 278 U.S. 492, 494 (1929) the Court held that a denial of a Writ of Prohibition by the Supreme Court of the State of Missouri was a final judgment reviewable under certiorari. See also Bullock v. State of Florida ex rel Railroad Comm. of the State of Florida, 254 U.S. 513 (1921); Pan American Petroleum Corp. v. Superior Court of the State of Delaware in and for New Castle County, 366 U.S. 656 (1961); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Obviously, the making of the Writ of Prohibition absolute by the State of Missouri is a final determination on the issues now before the Court and renders petitioner's Application for Writ of Certiorari ripe for review.

THERE EXISTS BETWEEN THE VARIOUS STATES SUBSTANTIAL CONFLICTS AS TO HOW THE ISSUES PRESENTED HEREIN AND THE SUPPORTING CONSTITUTIONAL PRINCIPALS HEREINAFTER CITED AND RELIED ON SHOULD BE APPLIED TO SIMILAR SITUATIONS AS PRESENTED IN THE CASE AT BAR.

The States presently disagree as to how to apply identical principals of constitutional law and such disagreement has substantially grave results for a man facing possible execution. It is important that the Supreme Court interpose and direct the various lower tribunals in a manner that insures to all citizens of the various States and those defendants similarly charged the full unequivocal understanding of the constitutional protections and rights guaranteed to them. The role of the Supreme Court as arbiter among the various lower tribunals in the Federal system has assured to the citizens from various parts of the country equal status and protection of the laws. This Court in Fuller v. Oregon, 417 U.S. 40 (1974) noted in granting certiorari that Courts in other States in reviewing similar Statutes as the one in question have expressed views inconsistent with the decision of the Oregon Court and found that to be a compelling reason for the Supreme Court to grant certiorari. Obviously, conflicting decisions among the

State tribunals can result in repeated, irreconcilable and unalterable injustices upon the parties involved. This Court and only this Court can finally and adequately determine the extent to which the constitutional principals involved protect the petitioner and others in like situations. Without a final determination from this Court as to how the Fifth, Sixth and Fourteenth Amendments to the United States Constitution should be applied, the only result would be a substantial deprivation of constitutional immunities afforded other citizens but denied this petitioner. It is also petitioner's contention that the decision of the Missouri Supreme Court in making the Rule of Prohibition absolute is in conflict with other decisions of this Court and as such is reviewable. City of Pittsburgh v. Alco Park, Corp., 417 U.S. 369, 371, (1974). Obviously, one of the functions of the Supreme Court is to resolve and accomodate diversities and conflicts, especially when important Federal questions are involved. Charles Dowd Box Company v. Courtney, 368 U.S. 502 (1962). In DiBella v. United States, 369 U.S. 121, 122 (1962), the Court stated: "Not only disagreement among the circuits but dubieties within them, demanded an adjudication based upon searching consideration of such conflicts and confused views regarding the problem of considerable importance in proper administration of criminal justice." Obviously, the effective administration of criminal justice would require the Supreme Court's final decision on the points presented in this case. Calbo v. United States, 364 U.S. 611 (1961). If petitioner had been a citizen of the State of California, People v. Henderson, 60 Cal.2d, 482, 386 P.2d 677, (1963); People v. Payne, 142 Cal. Rpt. 320; People v. Johnson, 113 Cal. Rpt. 303; the State of Georgia, Ward v. State, 239 Ga. 205, 236 S.E.2d, 365 (1977); the State of Pennsylvania, Commonwealth v. Littlejohn, 433 Pa. 336, 250 A.2d 11 (1969); or the State of Florida, Robertson v. State, 258, So.2d 257 (1971), he would not be subjected to retrial for the penalty of death. The principals of constitutional law are identical. It is the decisions and the applications of these principals that differ. There is no reason in logic or justice that would require that petitioner,

as a resident of the State of Missouri should lose his life where other States would demand that it be protected by the Constitution that all are governed by. Indiana would appear to be the only State which is in agreement with the decision that is handed down by the State of Missouri. Layton v. State, 240 N.E.2d 489, (S.Ct. 1968), however, the Court in that decision, did not have to deal with the argument that there was an implied acquittal of a greater offense. Where the States disagree as to how to apply identical principals of Constitutional law, especially under circumstances where a man's life is at stake and where the law itself is subject to multiple interpretations by the various justices of this Court, it is imperative that the Court direct the States within the prescribed limitations as to how various constitutional principals should be applied in these and similar cases. Certainly, the luck of the locale should not determine the length of the life.

THE COURT SHOULD NOT COMPEL THE PETITIONER TO UNDERGO THE EMOTIONAL AND MENTAL TORMENT OF FACING A SENTENCE OF DEATH AT A SECOND TRIAL BY REFUSING TO GRANT CERTIORARI.

To subject petitioner to retrial with the possibility of a death sentence would seriously prejudice his right to a fair trial concerning guilt regardless of the jury's final sentence. As indicated earlier, the Witherspoon question will always present a problem in impaneling a jury on a death penalty case. It is petitioner's belief that such a question should not be allowed unless it is readily apparent that the death penalty can and should be sought in the case at bar. There can be no question that the exclusion of the jurors under the principals as outlined in Witherspoon for cause will undoubtedly change the composition and the demeanor of the panel that remains. Whether or not this change in composition and demeanor is enough in and of itself to mandate a new trial has not been decided. However, where the Court should never have allowed the Witherspoon question to be asked because the death penalty could not have been constitutionally sought, there can be no

doubt that the resulting strikes for cause severely prejudiced and hampered petitioner's right to an unbiased and impartial juror of his peers.

Obviously, if the petitioner faces death, substantial efforts and expense must be directed towards the punishment phase of the trial. Furthermore, at every stage of the guilt phase, certain questions of trial strategy must be decided with full consideration of the punishment phase of the trial. The same jury that hears the evidence of guilt hears the evidence of punishment. In the same vein, constant decisions made throughout the trial concerning trial strategy, cross-examination of witnesses, presentation of defense witnesses, decisions as to whether or not the petitioner should testify and the application of counsel's time would undoubtedly be altered if there is no possibility of a death penalty and no penalty phase proceedings. While these difficulties present themselves in all capital trials, it should not be forced upon the petitioner because of an erronous ruling by the Supreme Court of Missouri. The petitioner should not be compelled to face death a second time while the questions presented herein remain unresolved until this petitioner has undergone a trial unconstitutionally improper from its inception. No one can deny the emotional and mental torment facing the petitioner who has to undergo the rigors of a trial for his life. Emotional and mental strain, separate and apart from the financial and social crisis, would indeed be an unduly harsh and cruel result if the petitioner were to subsequently and successfully argue the death penalty could never be constitutionally obtained at his trial. The petitioner should be allowed to direct his attention to those details which would most adequately and effectively serve as a defense. The more areas he has to investigate the thinner his protection will be. Therefore, if he should not constitutionally be concerned about the death penalty he should not, realistically, have to be concerned with the death penalty.

One of the petitioner's primary contentions at all proceedings in the trial court as well as the Supreme Court of the State of Missouri was that the State would be precluded from seeking the death penalty

at petitioner's retrial by the double jeopardy clause of the Fifth Amendment to the Constitution of the United States and the principal of Collateral Estoppel. The Supreme Court of Missouri rejected these arguments citing Stroud v. United States, 251 U.S. 15 (1919) and Chaffin v. Stynchombe, 412 U.S. 17 (1973). It is petitioner's opinion that this is a misapplication of the law and finding in those cases. Both of these cases are readily distinguishable from the case at bar in that neither involve bifurcated proceedings nor did they involve specific findings of fact as a requirement before a particular sentence could be imposed.

There can be no question that the statutes of the State of Missouri require the finding of an existence of at least one of the ten aggravating circumstances enumerated in 565.012.2 R.S.Mo. 1977 before a sentence of death can be returned. In Stroud, supra, the jury was not instructed to find the existence of any factual circumstances to support any sentence permissible. Further, in Stroud, the petitioner never argued that the death sentence on retrial was prohibited by the double jeopardy clause, he argued that the retrial itself was prohibited. North Carolina v. Pearce, 395 U.S. 711 at 748. None the less, the circuitous and tightly reasoned evolution of the law surrounding the imposition of the sentence of death at present demands specific guidelines for the jury and specific findings of fact by the jury. When Stroud was argued, such requirements were non-existent and unheard of. Today they are constitutional requirements. It has never been this petitioner's contention that he could not be retried, it has only been his contention that he could not be sentenced to death and therefore placed twice in jeopardy. The Supreme Court of Missouri's reliance on a case that is sixty years old and decided in an era long before the present evolvement and development of law concerning the death penalty severely stretches its unbriefed holding across a legal history that mandates a review of such questionable precedent.

Chaffin, supra, as well does not involve a bifurcated

proceeding nor was the jury required to find the existence of certain facts prior to imposing a sentence. It is petitioner's belief that it is imperative that this Court decide whether or not the principals of law previously applied to noncapital cases or cases prior to the Court's decision in Gregg v. Georgia, 428 U.S. 153, (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976) are still applicable to the new sentencing procedures. Without question, these decisions direct the various State legislatures to enact statutes unlike any in the past. The decisions in Chaffin and Stroud cannot possibly control as precedent for the statutes under which petitioner was convicted. It is petitioner's contention that the Capital Murder statute in its entirety is written and the jurors are instructed in such a way as to create two separate offenses: Capital Murder Punishable by Life Imprisonment and Capital Murder Punishable by Death. 565.001 et seq. R.S.Mo. 1977. The former is necessarily a lesser included offense of the latter, because the elements of the two are identical with the exception that to sustain a conviction for Capital Murder Punishable by Death, the jury must find that one or more of the aggravating circumstances enumerated in the statute exists beyond a reasonable doubt. The Supreme Court of Missouri contends that "It is not our perogative to create separate crimes from those defined by statute". State ex rel v. Mason, 594 S.W.2d 908, 912 (Mo. 1980), however, it has always been the function of the Court not the legislature to determine whether or not a particular crime is a lesser included offense of another charge. It is the courts who are responsible for instructing the jurors on lesser included offenses, not the legislature.

The test for determining whether one violation is a lesser included offense of another is whether it is impossible to commit the greater offense charged in the information with having first committed the lessor. Obviously, as the only change in elements is the existence of one of the two enumerated aggravating circumstances, there can be no

question that Capital Murder Punishable by Life is a lesser included offense than Capital Murder Punishable by Death.

The fact that this finding was made through a bifurcated proceeding does not effect the nature of the jury's finding. The bifurcated hearing exists only as a procedural requirement necessary to insure that certain facts, admissible to establish aggravation, are not presented to the jury until the verdict is determined. These facts would naturally be of little, if any relevance to the question of guilt and could be extremely prejudicial to petitioner. Therefore, to insure to the State an opportunity to present otherwise inadmissible evidence, and to allow the petitioner to present evidence in mitigation, the trial is divided in two parts. There is, however, only one finding.

At petitioner's first trial he was sentenced to life imprisonment after presentation of evidence, argument and due deliberation. The jury was instructed by the Court that to impose a death penalty, they must "find and believe beyond a reasonable doubt" that the submitted aggravating circumstances existed. By finding that the petitioner should be sentenced to life imprisonment, the jury impliedly acquitted him of Capital Murder Punishable by Death. The State has conceded that the evidence to be presented at the punishment phase of the second trial is identical to that presented at the first. They have pled the exact same aggravating circumstances at both the first and second trial. Consequently, double jeopardy precludes a retrial on a charge from which a defendant has been acquitted, impliedly or otherwise. Green v. United States, 355 U.S. 184 (1957).

In Price v. Georgia, 398 U.S. 323 (1970) the defendant was convicted of the crime of voluntary manslaughter. After successful appeal and reversal, the State sought to retry on the greater offense of murder. The Court in reversing the conviction stated at page 327, "...the first verdict, limited as it was to the lesser included offense, required that the retrial be limited to that lesser offense." Petitioner's jeopardy on the greater charge of Capital Murder Punishable by Death has ended when the first jury was given a full opportunity to return a verdict on

that charge and instead reached a verdict on the lesser charge of Capital Murder Punishable by Life. The necessity for deciding petitioner's double jeopardy claim prior to trial is also evidenced in Price wherein on page 29, the Court stated "Although the petitioner (Price) was not convicted of the greater charge on retrial whereas Green was, the risk of conviction on the greater charge was the same in both cases, and the double jeopardy clause of the Fifth Amendment is written in terms of potentional risk of trial and conviction, not punishment." The same principal that conviction of a lesser offense is an acquittal of the greater was applied in State v. Troynack, 384 A.2d 306 (Ct. 1977) wherein the Supreme Court of the State of Connecticut ruled that a verdict of guilty of manslaughter in the second degree precluded a retrial for the crime of manslaughter in the first degree.

In People v. Mayo, 407 N.Y.S.2d 918 (N.Y. 1978), it was held that where a trial court submitted only robbery in the second or third degree, double jeopardy prevented a retrial on first degree robbery because the Court's decision was the functional equivalent of an acquittal of first degree robbery. Although the Missouri legislature admittedly did not classify the offenses separately, there is no question that in the minds of the jury and in the minds of the legal practitioner, the necessity of proving beyond a reasonable doubt the existence of one of the ten elements set out in the statute constitutes the additional element makes the crime of Capital Murder Punishable by Life a lesser included offense of Capital Murder Punishable by Death.

The principal of collateral estoppel, which is closely related to double jeopardy, distinguishes the case at bar from all those cases cited by the Supreme Court of the State of Missouri. Ashe v. Swenson, 397 U.S. 436 (1970). The State's attempt to seek the death penalty is in direct conflict with the holding in Ashe, supra, and with the policies behind the double jeopardy clause. Justice Stewart stated it clearly and concisely:

> "Collateral estoppel...stands for an extremely important principal in our advisary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be relitigated between the same parties in any future law suit."

and later,

> "The ultimate question to be determined, then, in the light of Benton v. Maryland, supra, is whether this established rule of Federal Law;as embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else the constitutional guarantee may embrace, North Carolina v. Pearce, 395 U.S. 711, 717, 23 L.Ed.2d 656, 664, 89 S.Ct. 2072, it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time, Green v. United States, 355 U.S. 184, 190, 2 L.Ed.2d, 199, 205, 78 S.Ct. 221 61 ALR.2d 119."

The double jeopardy clause and collateral estoppel were designed to "...protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged defense." Green v. United States, supra, 1.C.187. In Green, the defendant had been retried on a charge of first degree murder after he was previously tried and convicted of second degree murder. The Court found this constitutionally impermissible and recognized the right to be protected from such a retrial and holding that such protection was a vital safeguard which should not be given a narrow construction.

The State would not only have the petitioner run the gauntlet a second time, but is claiming a right to do so because its ammunition was not lethal enough the first time.

It cannot be successfully argued that the petitioner somehow waives his right to argue the effectiveness of a decision rendered by a jury successfully attacked as unconstitutional by him. The fallacy of this contention is apparent. One constitutional guarantee does not disappear because you seek to enforce another. The petitioner cannot be expected to choose between his rights. It is up to the State and the Courts to insure that he receives those rights, not be forced to select between them. Surely, if the petitioner had been acquitted of the charge of Capital Murder, the State could not contend that he should be retried for the offense a second time because of his successful attack on the jury. There is no difference here.

The issue was tried, argued, deliberated and decided. The State lost. They cannot reload and try to kill this petitioner a second time.

The Supreme Court of Missouri in its decision makes much of the alleged inconsistentcy of attacking the jury in one breath while arguing its findings should be upheld in another, and that petitioner "sought" (page 11) and "chose" (page 13) to place himself in the position of re-litigating his right to live. The petitioner is unwilling to indulge in such fiction.

On July 24, 1978, the petitioner filed his Motion to Quash the Jury Panel by attacking its method of selection. The same issue had been litigated and appealed to the Supreme Court of Missouri and the relief sought, i.e., to be tried by a constitutional jury was withheld from him in accordance with State v. Duren, 547 S.W.2d 476 (Mo. 1977). At every stage of the proceeding, the petitioner requested a constitutional jury, and the trial court, following the directives of the Supreme Court of Missouri, refused his request. Thereafter, the defendant repeated his contentions in his Motion for New Trial, although he recognized that the "damage was done".

Finally, this Court in reversing Duren, State v. Duren, 99 S.Ct. 664 (1979) granted to the petitioner the relief he had requested since well before his trial. It is indeed fiction to suppose or argue that he had any "choice". He "sought" a fair trial. It was denied him. The petitioner was not the moving factor but the pawn shuffled between the Courts. Now, the Supreme Court of Missouri, having been "instructed" to grant the petitioner a new trial seeks to force him to run the gauntlet a second time. This petitioner must once again risk his life at trial and agonize over whether his request for a constitutional jury may in fact kill him. Likewise, the majority opinion in the Supreme Court of the State of Missouri argues that under the instructions the jury could indeed grant mercy and sentence the petitioner to life imprisonment even if the existence of one of the aggravating circumstances had been proven, (Page 8). This is obviously, speculation in an attempt to determine what decision the jury made in the

case at bar, completely overlooking the instructions given to them. Ashe, supra, talks of a "rational jury". The Court would argue that this term must apply to the supposed findings of a jury if such findings were at all possible thereby denying the clear mandate in Ashe. The Supreme Court of Missouri further overlooked the fact that no mitigating evidence was presented at the second stage of the trial. It is petitioner's argument however that such a grant of mercy, if it did exist, itself embodies a finding of fact, i.e., that death is inappropriate in this particular case and therefore should be binding under the principal of collateral estoppel. In any case, the Court in Witherspoon v. Illinois, supra, page 522 n.20 forbade the States from employing procedures that "deliberately tipped (the scales) toward death". A system that would allow retrial everytime mercy is granted but disallows them whenever it is not, would have this forbidden scale-tipping effect.

Missouri Law provides that the Supreme Court of the State should review all death sentences and with regard to that sentence shall determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," 565.014(3) subsection 3, R.S.Mo. 1977. The identical language is included in the statutes for the State of Georgia which were found to be constitutional in Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, at 890, wherein the Court stated:

> "As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That Court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury findings of a statutory aggravating circumstance and whether this sentence is disproportionate compared to those sentences in similar cases." Section 27 2537(c) (Supp. 1975).
>
> "In short, Georgia's new sentencing procedures require a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard further against a situation comparable to that presented in Furman, the Supreme Court of Georgia compares each death sentence with situated defendants to insure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of Furman. No longer should there be 'no meaningful

basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which is not'". 408 U.S. at 313.

And on page 892,

"Finally, the Georgia statute has an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The new sentencing procedures require that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance and 'whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant'" Section 27-2537 (c) (3) (Supp. 1975).

"The provision for appellate review in the Georgia Capital-Sentencing System serves as a check against the random or arbitrary imposition of the death penalty. Inparticular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If the time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death."

Obviously, this is one of the main reasons that this court decided that the Georgia Statute did not violate the principals established in Furman v. Georgia, supra.

Because this provision appears in the Missouri Statute, the same considerations are in review and must be applied by the Missouri Courts. In the case at bar, the petitioner was tried on the identical facts that the State hopes to produce at the second trial. The jury basically heard the same evidence and in essence the same arguments that the second jury will hear. In the first trial, the jury found life to be appropriate. How can a sentence of death at the second trial be upheld in light of Gregg and the principals enunciated therein? How can anyone argue that a death sentence in the same case with the same defendant is not disproportionate or excessive in light of the first jury's original verdict? The Supreme Court of Missouri makes much of the fact that they cannot determine what the evidence will be at Bullington's retrial. Three times in response to questions by the Court, the State indicated that the evidence concerning the aggravating circumstances and the guilt phase of the trial will be identical at the second proceeding. The dissent of Judge Seiler re-emphasizes these

points and discloses the attempts of the majority opinion of the Supreme Court of the State of Missouri to avoid the clear mandate of Furman, and Gregg.

In a recent Georgia case, Ward v. Georgia, 236 S.E.2d 365 (Ga. 1977) the same factual situation as in the case at bar was presented to the State Supreme Court. Relying on the statute and Gregg, supra, the Court ruled the death penalty, if imposed on a retrail after defendant had received a sentence of life imprisonment at the first trial would necessarily be excessive and disproportionate. It is petitioner's position that this interpretation is the only reasonable interpretation available under the principals developed in Gregg and Furman.

The evidence at petitioner's first trial when reviewed in the light most favorable to the State established that the victim's body was found floating in a creek several days after her disappearance. The pathologis testified that death resulted from drowning; that there was no evidence of trauma other than a small superficial cut on her forehead; and no evidence of sexual abuse or contact.

The evidence in aggravation established that petitioner had been previously convicted of kidnapping and robbery.

If Furman, supra, stands for anything it stands for the proposition that a statute which gives to a Judge or a jury unguided discretion as to whether to impose death or life imprisonment is unconsititional.

The question thus becomes whether the "standards of the aggravating circumstances to be presented at petitioner's retrial are such as to conform with due process of law. The principals of constitutional law are clear enough. In Cramp v. Board of Public Construction, etc., 368 U.S. 285 (1961) the Court held:

> "We think this case demonstrately falls within the compass of those decisions of the Court which hold that '...a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed.

888. 'Words which are vague and fluid...may be as much as a trap for the innocent as the ancient law of Caligula' United States v. Cardiff, 344 U.S. 174, 176, 73 S.Ct. 189, 190, 97 L.Ed. 200. 'In the light of our decisions it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.' Champlin Refining Co. v. Corporation Commissions of Oklahoma, 286 U.S. 210, 243, 52 S.Ct. 559, 568, 76 L.Ed. 1062.

In Godfrey v. Georgia, No. 78-6899, decided May 19, 1980, the Court held that under factual circumstances presented the aggravating circumstance identical to the one pled by the State was unconstitutional, 565.012.2(7) R.S.Mo. 1977. This Court therein stated that:

> "...if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless (sentencing) discretion' Gregg v. Georgia, 428 U.S. at 196, n.47. See also Proffitt v. Florida, 428 U.S. 242; Jurek v. Texas, 428 U.S. 262. It must channel these sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that make 'rationally reviewable the process for comparing a sentence at death'. As it is made clear in Gregg, a death penalty 'system could have standards so vague that they would fail adequately to channel the sentencing decision pattern of juries with the result that a patter of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur'. 428 U.S. at 195 n.46.

Clearly, there was no evidence at the first trial nor will there be any evidence at the second trial that the alleged crime involved torture or depravity of mind. Nor was there anything to indicate the murder, if indeed it was a murder, was anymore horrible, vile or wanton than any other murder must necessarily be.

The second aggravating circumstance, which is likewise identical to the aggravating circumstance which appears in the Georgia law is that the petitioner has a substantial history of serious assaultive convictions. There is no definition in the statute of the words "substantial" or "history". Likewise, there is no definition of what constitutes a serious assaultive conviction. The Georgia Supreme Court in Arnold v. State, 224 S.E.2d 386 (Ga. 1976) found that that standard was unconstitutionally vague and therefore unenforceable. If the legislature in the case at bar had believed that two convictions were enough it would have indicated that by phraseology such as "The defendant has been convicted

of more than one serious assaultive conviction." It is petitioner's contention that both the aggravating circumstances pled and relied on by the State of Missouri in an attempt to impose the death penalty are unconstitutionally vague and overbroad and do not provide the jury with "adequate guidance necessary under Furman and Gregg."

Petitioner was granted a new trial after this Court handed down its decision in State v. Duren, 99 S.Ct. 664 (1979). Subsequently, the State filed its Notice of Evidence in Aggravation depsite the fact that the issue of punishment, which was a separate trial had already been resolved. The effect of allowing the State to seek the death penalty is to force petitioner into foregoing his constitutional rights in order to avoid putting his life on the line. Furthermore, in Section 557.036.2 R.S.Mo. 1978 grants to petitioner an absolute right to have the issue of punishment submitted to the Court rather than the jury. The death penalty statute recognizes that either the jury or the court may sentence the petitioner. 565.006.2 R.S.Mo. 1978. If the Judge could not sentence petitioner to a punishment greater than life imprisonment under those principals as outlined in North Carolina v. Pearce, 395 U.S. 711 (1969), the petitioner is thereby faced with the incredible dilemma of (1) choosing whether or not the Judge or jury should determine the guilt or innocence and (2) choosing whether or not the jury or Judge should sentence him. If he chooses the Judge he will have to forego his right to trial by jury but will not face the harshest punishment of all. If he chooses the jury it could in fact cost him his life. This dilemma is dealt with at length by Justice Seiler in his dissent on pages 13-15.

The Supreme Court of Tennessee recognized this principal in Sommerville v. State, 521 S.W.2d, 792 (1975). Quoting from North Carolina v. Pearce, supra, the Court stated:

> "Due process of the law, then, requires that vindictiveness against the defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial and since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such retaliatary motivation on the part of the sentencing Judge."

The Supreme Court of Michigan has also concerned itself with this

chilling effect. See People v. Jones, 271 N.W.2d 515 (1978).

> "The two purposes for the resentencing restrictions imposed by Pearce, were to insure (i) that vindictiveness against defendant for successfully attacking his first conviction...would play no part in the sentence he receives after a new trial...and (ii) that apprehension of such vindictiveness would not deter a defendant's exercise of the right to appeal or collaterally attack his first conviction."

The Supreme Court of California in 1963 also ruled in People v. Henderson, 386 P.2d 677 (1963), that a harsher sentence at a second trial was prohibited by double jeopardy.

A jury found the defendant guilty of murder in the first degree and fixed the penalty at death. In a previous trial for the same offense, the defendant waived trial by jury and pled guilty to murder in the first degree. He was sentenced to life imprisonment. The Court relied on Green v. United States, supra, wherein the Supreme Court held that a defendant is not required to elect between suffering an erronous conviction to stand unchallenged and appealing therefrom at the cost of forfeiting a valid defense to the greater offense. A defendant faced with such a "choice" takes a "desperate chance" in securing the reversal of the erronous conviction. "The law should not, and in our judgment, does not place the defendant in such an incredible dilemma." The Court goes on to state "...a reversed conviction of a lesser degree of a crime precludes conviction of a higher degree on retrial...". It is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the legislature divides a crime into different degrees carrying different punishments or allows the Court or the jury to fix different punishments for the same crime. Quoting from Justice Frankford in the Green case:

> "...it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment."

The law in California pursuant to Henderson is:

> "Defendant's right to appeal from an erronous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the State has no interest in preserving erronous judgment, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal."

The Supreme Court in Pearce held that the imposition of a penalty upon a defendant for having successfully pursued his statutory right of appeal or collateral remedy would be "...a violation of due process of law" at 724, 23 L.Ed.2d 656, "...because vindictiveness against a defendant for successfully attacking his first conviction must play no part in the sentence he receives after a new trial" at 725. The Court in Blacklege v. Perry, 417 U.S. 21 (1974), applied those standards if vindictiveness to the prosecuting attorney. In that case, defendant was found guilty of a misdemeanor after a trial and appeal de novo to a higher court. The prosecuting attorney obtained an indictment with a felony assault charge rather than a misdemeanor for which he was originally tried. In granting a writ of habeas corpus, the Court through Justice Stewart stated:

> "A lesson that emerges from Pearce, Colton and Chaffin, is that the due process clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of 'vindictiveness'."

The Court was simply following its earlier opinion in United States v. Jackson, 390 U.S. 570 (1968) striking down a kidnapping statute which authorized only the jury to impose the death penalty, stating:

> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. Cf. United States v. Robel, 389 U.S. 258, 19 L.Ed. 2d 508, 88 S.Ct. 419; Shelton v. Tucker, 364 U.S. 479 488-489, 5 L.Ed2d, 231, 237-238, 81 S. Ct. 247. The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive.

The analogy between Jackson and the case at bar is obvious. The Court struck down the statute because by its construction it necessarily infringed, impeded and chilled defendant's ability to freely exercise a constitutional right. Petitioner has a right to a properly and constitutionally impaneled jury as well as right to a trial before that jury. It is unconstitutional for the prosecutor to attempt to punish him for exercising his right.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Richard H. Sindel,
Attorney for Petitioner
15A N. Meramec, Suite 200
Clayton, Missouri 63105
314/721-6040

A copy of the foregoing was mailed this 6th day of June, 1980, to Jim Cook, Prosecuting Attorney's Office, 7900 Carondelet, Clayton, Missouri, 63105.

EXHIBIT A

REVISED STATUTES OF MISSOURI 1977

557.036.2

The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as a part of their verdict, unless the defendant requests in writing that the court assess the punishment in case of a finding of guilt. If the jury finds the defendant guilty but cannot agree on the punishment to be assessed, the court shall proceed as provided in subsection 1 of this section. If there be a trial by jury and the jury is to assess punishment and if after due deliberation by the jury the court finds the jury cannot agree on punishment then the court may instruct the jury that if it cannot agree on punishment that it may return its verdict without assessing punishment and the court will assess punishment.

565.001.

Any person who unlawfully, willfully, knowlingly, deliberatly, and with premeditation kills or causes the killing of another human being if guilty of the offense of capital murder.

565.006.1

At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment, and by their verdict ascertain whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment, and by its verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense.

565.008.1

Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

565.008.2

Persons convicted of murder in the first degree shall be punished by imprisonment by the division of corrections during their natural lives. Persons convicted of murder in the second degree shall be punished by imprisonment by the division of corrections for a term of not less than ten years.

565.012.1

In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence,

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence,

(3) Any mitigating or aggravating circumstances otherwise authorized by law, and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstances found to exist.

565.012.2

Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of

conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

565.012.3

Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior ciminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of crime.

565.012.4

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

565.012.5

Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

EXHIBIT B

Supreme Court of Missouri

en banc

FEB 11 1980

IN OFFICE OF
CLERK SUPREME COURT

STATE ex rel. GEORGE R. WESTFALL,

Relator,

v.

HON. DONALD L. MASON, Judge, 16th Judicial Circuit,

Respondent.

No. 61499

I

Prohibition, to prevent respondent, the Honorable Donald L. Mason[1] Judge of the Sixteenth Judicial Circuit, from proceeding in the retrial of Robert Bullington for capital murder (the indictment charged numerous offenses) without allowing the prosecution to seek imposition of the death penalty.

Prior to trial in 1978 the State under § 565.006(2), RSMo 1978,[2] filed a "Notice of Evidence in Aggravation" announcing its intention to seek the death penalty in the capital murder charge. That trial resulted in a verdict of guilty on all counts including capital murder, October 11, 1978. A hearing was conducted the next day under the bifurcated procedure mandated by § 565.006, RSMo 1978, in which the jury was presented additional evidence in "extenuation, mitigation, and aggravation" of punishment. The jury directed that defendant be sentenced to life imprisonment without probation or parole for not less than fifty years.

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[1] Defendant was charged in the Circuit Court of St. Louis County by indictment with capital murder, kidnapping, armed criminal action, burglary first degree and two counts of flourishing a deadly weapon. The cause was transferred on change of venue to the Sixteenth Judicial Circuit in Jackson County, Missouri.

[2] See also § 565.006, RSMo Supp. 1979 (as amended) (effective date September 28, 1979).

Defendant's motion for new trial, challenging the constitutionality of the Jackson County jury panel, was sustained February 13, 1979, in light of the United States Supreme Court's holding in Duren v. Missouri, 439 U.S. 357 (1979). In preparation for Bullington's retrial the State has filed a second "Notice of Evidence in Aggravation" indicating its continued intention to seek the death penalty.[3] Responding, defendant moved to strike that "Notice" and to exclude from trial all evidence in aggravation of punishment. Respondent announced his intention to enter an order sustaining defendant's motion to strike, "to the extent that the state will not be permitted to seek the death penalty, should the defendant again be found guilty of capital murder." Relator then sought prohibition and for reasons now discussed, our preliminary rule heretofore entered is made absolute.

II

Respondent first contends prohibition is inappropriate procedurally because (1) relator (Prosecuting Attorney of St. Louis County) failed to allege the State had no adequate remedy at law, (2) that the state's limited right of appeal forecloses resort to prohibition, and (3) the issue does not involve the jurisdiction of the trial court. The first contention may be disposed of summarily. On October 2, 1979, by order of this Court relator was permitted to amend its petition and allege the State had no adequate remedy at law. As to respondent's second argument it is precisely because the state has an extremely limited right of

3 The notice advises the State will present evidence of two aggravating circumstances. First, that the killing was committed by a person with substantial history of serious assaultive convictions. § 565.012.2(1), RSMo 1978. Second, that the offense was outrageously or wantonly vile, horrible or inhuman. § 565.012.2(7), RSMo 1978.

appeal under § 547.210, RSMo 1978, and Rule 28.04 (now Rule 30.02) that extraordinary relief is proper to review interlocutory orders in criminal cases. See State ex rel. Corcoran v. Buder, 428 S.W.2d 935, 939 (Mo. App. 1968). Further, it is settled law that, "The writ is properly invoked to restrain the enforcement of orders beyond or in excess of the authority of a judge and to keep a court within the compass of its jurisdiction." State ex rel. Vogel v. Campbell, 505 S.W.2d 54, 58 (Mo. banc 1974). Because, as we shall presently discuss, neither the federal nor state constitutions nor Missouri law prevent Bullington from being subject to the death penalty on retrial, the trial court exceeded (or by its announced order would have exceeded) its authority in denying the state leave to seek imposition of the death penalty. Accordingly, prohibition lies. See State ex rel. Peach v. Bloom, 576 S.W.2d 744 (Mo. banc 1979).

III

The principal question for our determination is whether on retrial the death penalty under § 565.008, RSMo 1978 is barred as possible punishment by constitutional or statutory considerations. Respondent argues that because the jury in the first trial convicted Bullington of capital murder but sentenced him to life, the fifth amendment's prohibition against double jeopardy, the eighth amendment's proscription of cruel and unusual punishment, the fourteenth amendment's guarantee of due process and § 565.014.3(3), RSMo 1978, prevent the State from continuing to seek the death penalty. Long settled constitutional doctrine enunciated by this Court and reiterated in recent decisions of the United States Supreme Court leads to rejection of these challenges.

A defendant successfully overturning a conviction for a particular offense may in most instances be retried for that offense notwithstanding double jeopardy doctrine.[4] United States v. Ball, 163 U.S. 662, 672 (1896); Forman v. United States, 361 U.S. 416, 425 (1960); United States v. Ewell, 383 U.S. 116, 121 (1966). In some cases the rationale for such results has been couched in language of a waiver theory and in others that retrial constitutes but continuing jeopardy. However the rule is more usually described in terms of policy considerations. As Mr. Justice Harlan explained in United States v. Tateo, 377 U.S. 463, 466 (1964),

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the Ball principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

Essentially respondent argues that the federal double jeopardy clause prohibits not the retrial for the offense of capital murder (Bullington was convicted of that offense) but only the imposition of a more severe punishment upon retrial. Such contention was squarely rejected sixty years ago in Stroud v. United States, 251 U.S. 15

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[4] For a limited exception to this rule see Burks v. United States, 437 U.S. 1, 18 (1978).

(1919). There defendant[5] was convicted in a second trial for the murder of a prison guard and sentenced to life imprisonment by the jury. On retrial (his third) secured by Stroud, the new jury also convicted him of first degree murder and he was sentenced to death. The Court held the fact that Stroud was subjected to the increased punishment of death upon retrial did not place him in double jeopardy. In North Carolina v. Pearce, 395 U.S. 711, 720 (1969), the Court reaffirmed that a necessary corollary of the power to retry a defendant is the state's power to impose any legally authorized sentence upon reconviction, though greater than the sentence originally imposed. In refusing to depart from an unbroken 75 year line of decision supporting this principle, the court explained, "[T]he original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." Id. at 721. Recently the Court referred to Stroud as a "well-established part of our constitutional jurisprudence" and specifically declined an invitation to discard the principles stated there. Chaffin v. Stynchcombe, 412 U.S. 17, 24 (1973). Within the past year the United States Court of Appeals for the Sixth Circuit, following Stroud and rejecting this same argument, held that the fifth amendment does not forbid imposition of the death penalty on retrial of defendant for an offense upon which he was originally sentenced to life. Gully v. Kunzman, 592 F.2d 283, 289 (6th Cir. 1979), cert. denied, 99 S. Ct. 2850 (1979).

Despite respondent's stated intention to circumvent the effect of Stroud and the decisions following it, we find nothing in the federal constitutional guarantee against double jeopardy to prevent the state from seeking the death penalty on Bullington's retrial for capital murder.

Respondent quite untenably suggests that the legislature has bisected the crime of capital murder defined in § 565.001, RSMo 1978.[6] He argues that if life imprisonment is the penalty imposed, the offense is somehow transfigured and changed into a lesser included offense of capital murder with capital punishment and becomes the

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[5] Stroud was popularly known as the "Birdman of Alcatraz."

[6] Section 565.001, RSMo 1978, provides: "Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder."

crime of capital murder without capital punishment. Thus, he concludes, the jury's imposition of life imprisonment implicitly constitutes an acquittal of the greater offense. We are unwilling and indeed are unauthorized to indulge such fiction. It is not our prerogative to create separate crimes from those defined by statute. The simple fact is that capital murder under § 565.001, RSMo 1978 is a single crime with the range of punishment established by the legislature at life imprisonment without probation or parole for 50 years to the death penalty. Respondent's argument not only runs contrary to the decided cases, it ignores the statutory sections which define capital murder, prescribe the punishments for that offense, and detail the procedures for imposing those punishments. As noted above, there is but one crime defined as capital murder and the acts proscribed are specified in § 565.001. It was for that offense Bullington stood convicted following the first trial and it is for that offense he remains charged and awaits retrial.

As recognized by this Court in State v. Duren, 547 S.W.2d 476, 478-480 (Mo. banc 1977), federal constitutional requirements forbad mandatory imposition of capital punishment. In response to the constitutional directive that the jury's discretion in capital sentencing be "suitably directed" so as to minimize the risk of arbitrary and capricious application, Gregg v. Georgia, 428 U.S. 153, 189 (1976), and that consideration of the individual circumstances of each offender and crime was "constitutionally indispensable," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Missouri legislature enacted § 565.006 and § 565.012, RSMo 1978, providing for a presentence hearing following a conviction for capital murder at which time aggravating and mitigating circumstances as to the offender and the offense would be considered.[7] The existence of these

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[7] The United States Supreme Court clarified the constitutional standards for imposition of the death penalty in five opinions announced in 1976. Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976). In these opinions the court struck down as unconstitutional the North Carolina and Louisiana statutes providing for mandatory imposition of the death penalty and upheld the capital sentencing procedures enacted by Georgia, Texas and Florida. As explained in Gregg, "[T]he concerns expressed in Furman that the penalty of death should not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." Gregg v. Georgia, 420 U.S. 153, 195 (1976).

sentencing procedures does not alter the fact that capital murder by statutory definition § 565.001, RSMo 1978, is a single offense, namely the unlawful, willful, knowing, deliberate and premeditated killing of another human being. The jury, in the § 565.006 proceeding, does not reconsider the issue of guilt, for that has been previously determined. Instead, at that stage they decide only the punishment to be imposed. In sum, the fact that the jury will consider the range of punishment for the offense of capital murder does not as respondent argues rend the crime of capital murder and create discrete offenses. The Stroud court dismissed such argument stating, "The fact that the jury may thus mitigate the punishment to life did not render the conviction less than one for first degree murder." Stroud v. United States, 251 U.S. 15, 18 (1919). See Redd v. State, 242 Ga. 876, 252 S.E.2d 383, 389 (Ga. 1979), cert. denied, 99 S. Ct. 2870.

Respondent also argues that the doctrine of collateral estoppel as embodied in the fifth amendment's protection against double jeopardy forecloses the state from seeking the death penalty if Bullington is again convicted of capital murder, and points to Ashe v. Swenson, 397 U.S. 436, 445 (1970). In Ashe the concept of collateral estoppel was elevated to the level of double jeopardy. There several poker players at their game table were robbed. Defendant was tried and acquitted for the crime of robbing player #1. An element necessary for conviction of that crime, (identity of the accused as the robber) was found against the State and defendant acquitted under his theory of alibi. In a later trial for the robbery of poker player #2 the Court deemed it double jeopardy to relitigate the identity issue. The Ashe Court stated that whether an issue of ultimate fact necessary for conviction is determined by a general jury verdict requires a court, "to examine

the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe v. Swenson, 397 U.S. at 444.

Respondent argues that a finding of no aggravation is necessary to the first jury's finding that defendant suffer life imprisonment rather than death for the crime of capital murder; hence the State is estopped from seeking to prove aggravation in the second trial. This contention is without merit for a number of reasons. A rational factfinder might well premise its imposition of life imprisonment on various factors other than the absence of aggravation. The applicable instructions drafted by the Supreme Court Committee on Patterned Criminal Charges and Instructions for death penalty proceedings demonstrate this option in the jury. Under MAI-CR 15.42 if the jury finds that at least one of the statutory aggravating circumstances exists, it must decide whether it is a "sufficient aggravating circumstance" to warrant the imposition of the death penalty. Even then the jury need not impose death if in its weighing process it intuitively feels the mitigating circumstance(s) tips the scale against the death penalty. MAI-CR 15.44. Finally, though the jury finds that sufficient mitigating circumstance(s) have not been shown, defendant is given the further benefit of our Instruction MAI-CR 15.46 which provides: "[Y]ou are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you." Thus the predilections of the jury as to mercy and the death penalty remain a part of the system within the limits and safeguards established by statute.

Clearly the first jury might have imposed life imprisonment in response to a defendant's plea for mercy rather than finding no aggravation. Ashe v. Swenson is inapposite here and the State is not precluded from seeking the death penalty by any aspect of the fifth amendment's protection against double jeopardy.

Respondent, relying on North Carolina v. Pearce, 395 U.S. 711 (1969), next argues that allowing the prosecution to seek the death penalty, should Bullington be reconvicted of capital murder, would violate principles of due process in that a finding of capital punishment by the jury at retrial would be "tainted by vindictiveness." However, Pearce is not controlling here. In that case, defendant's conviction was reversed through collateral attack but on retrial he was again convicted and when resentenced by the court received more severe punishment than that originally imposed. Id. at 713-714. The Pearce Court concluded, "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial . . . . [D]ue process also requires that a defendant be freed of apprehension of such a retalitory motivation on the part of the sentencing judge." Id. at 725. (Emphasis ours.) This exposure to possible vindictiveness of the sentencing judge does not occur in the jury sentencing process under Missouri's capital murder statutes.

The due process clause is not violated by all possibilities of increased punishment upon retrial, "but only by those that pose a realistic likelihood of vindictiveness." Blackledge v. Perry, 417 U.S. 21, 27 (1974). See Colten v. Kentucky, 407 U.S. 104, 116 (1972). Ludwig v. Massachusetts, 427 U.S. 618, 627 (1976). In this connection

the Supreme Court held recently that Pearce-like restrictions were inapplicable in jury resentencing at least where improper and prejudicial information regarding the prior sentence is withheld. Chaffin v. Stynchcombe, 412 U.S. 17, 28 (1973). The Chaffin court found the potential for vindictiveness in jury resentencing, de minimis for these reasons: First, a retrial jury in the normal course of events will be unaware of the disposition of the prior proceeding. Second, juries, unlike a trial judge, who has been reversed on appeal, will have no personal stake in the prior conviction and no motivation to engage in self-vindication on remand. Third, juries will not be sensitive to the institutional interests which might be promoted by imposing higher sentences after appeal as a means of discouraging meritless appeal. Id. at 26-27.

Respondent, in a final attempt to circumvent the clear import of Chaffin, suggests that because that case did not involve a bifurcated proceeding as provided under the Missouri capital murder statute, the holding there does not control our case. However, this overlooks the fact that Chaffin states:

> While some jury-sentencing States have adopted bifurcated jury trials, in which the jury assesses the punishment in a separate proceeding after a verdict of guilty has been rendered [citations omitted], bifurcation alone would not wipe away the fundamental differences between jury and judicial sentencing. It may make little sense to supply the jury with information about the defendant's conduct if the goal of jury sentencing is not necessarily to fit the punishment to the offender, and if the jury is, therefore, not concerned about matters considered pertinent to judicial sentencing.
>
> Petitioner and recent court of appeals cases suggest that an approximation of the Pearce limitations could be realized either by instructing the jury that it may return no verdict higher than the former sentence, or by empowering the judge to reduce the second sentence whenever it exceeds the former sentence. [citations omitted.] Although these alternatives would provide an absolute protection from the possibility of vindictiveness, they would also interfere with ordinary sentencing discretion in a manner more intrusive than contemplated by Pearce. They would achieve, in the name of due process, the substance of the result we have declined to approve under the Double Jeopardy Clause.

Id. at 28n.15.

Such constraints upon jury discretion as those urged by respondent would be particularly unfortunate in the capital sentencing area where individualized consideration of each offender is constitutionally required. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

Missouri decisions, prior to Chaffin, recognized that "vindictiveness" has no relevance to jury resentencing. See Spidle v. State, 446 S.W.2d 793, 795 (Mo. 1969). Kansas City v. Henderson, 468 S.W.2d 48, 52-53 (Mo. 1971), cert. denied, 404 U.S. 1004 (1971). Accordingly, we find that as a jury will decide whether Bullington should be subject to the death penalty if he is reconvicted of capital murder, there is no realistic likelihood of vindictiveness on retrial. It is appropriate to reemphasize that defendant has been awarded a retrial which he sought and it does not violate due process to permit such trial for the crime he was originally and still stands charged. Nor does the award of a new trial alter the range of punishment prescribed by the statute. The decision as to punishment under the prescribed procedure is that of the individual jury, not to be engrafted upon or controlling of a new jury not yet empaneled. To hold otherwise would distort the clear purpose of the statutory scheme which offers protection against aberrant results by establishing a system that allows the trier of fact (1) to determine guilt or innocence without the distraction of evidence irrelevant to that issue (§ 565.006), (2) if a guilty verdict is returned to consider facts in aggravation and mitigation as they relate to punishment (§ 565.006(2)), and (3) provides a system of mandatory review (§ 565.014) that guards against, among other things, a sentence imposed "under the influence of passion, prejudice or any other arbitrary factor." (§ 565.014.3(1)). This is not a deprivation of due process, but an extension to a high order of the process due the accused. The subsequent jury will decide the issues anew and it is their responsibility to determine guilt and assess the punishment upon conviction (§ 565.006.2).

Further, if on appeal reversal occurs "because of error only in the presentence hearing, the new trial . . . shall apply only to the issue of punishment." § 565.006(3). There is no suggestion in this language that on such new trial the range of punishment is restricted to life imprisonment only. To the contrary, the choice of punishment is the principal issue to be decided in such a new trial.

Respondent next contends the possibility of a harsher sentence on retrial would unconstitutionally chill defendant's rights of appeal. We do not agree. United States v. Jackson, 390 U.S. 570 (1968), cited by respondent as authority, involved a federal anti-kidnapping statute which allowed only the imposition of the death penalty following a jury trial. See 18 U.S.C. § 1201(a) (amended 1972). That statute was held to unconstitutionally deter the exercise of a defendant's fifth and sixth amendment rights to insist upon his innocence and demand a trial by jury. 390 U.S. at 581-583. Unlike the federal statute which singled for punishment by death that class of defendants who sought jury trials, the Missouri capital murder statutes draw no such invidious distinction.

Recent authority demonstrates that Jackson should be limited to statutes of the type which on their face penalize the assertion of constitutional rights. In Brady v. United States, 397 U.S. 742 (1970) and North Carolina v. Alford, 400 U.S. 25 (1970), defendants entered pleas of guilty to avoid the possibility of the imposition of capital punishment by a jury. The United States Supreme Court held that the fact a plea was entered to avoid the imposition of the death penalty by a jury did not ipso facto render the plea involuntary. Brady v. United States, 397 U.S. 742, 751 (1970; North Carolina v. Alford, 400 U.S. 25, 31 (1970). If the threat of the death penalty does not impermissibly coerce guilty pleas and encourage waiver of the plethora

of rights guaranteed in a criminal trial under the fourth, fifth, sixth and fourteenth amendments, we do not believe the possibility of capital punishment unconstitutionally chills a defendant's right to appeal. This view is supported by that expressed in Chaffin v. Stynchcombe, supra, at 35 where it is stated: "The choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may in fact be 'difficult,' does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction."

Respondent next contends that § 565.008, RSMo 1978, is unconstitutional because the death penalty permitted therein constitutes cruel and unusual punishment violative of the eighth amendment of the United States constitution and art. I, § 21 of the Constitution of the State of Missouri. This contention, first raised in defendant's Motion to Strike was renewed in respondent's brief before this Court with this language, "the death penalty, . . . is in all circumstances, a cruel and unusual punishment under both Federal and State constitutional provisions . . . " Respondent is quite mistaken, the death penalty is not per se violative of the eighth amendment. See Gregg v. Georgia, 428 U.S. 153, 187 (1976). Further, because the statutory procedures for imposition of the death penalty in Missouri are virtually identical to those contained in the Georgia statute challenged in Gregg no serious question remains as to their validity under the federal constitution. See Gregg v. Georgia, 428 U.S. 153, 196-207. Lockett v. Ohio, 438 U.S. 586, 604-605 (1978).

Thus we need examine only for the validity of § 565.008, RSMo 1978, under art. I, § 21 of the Missouri Constitution.[8] The ultimate question is whether the punishment is disproportionate to the crime for which imposed. State v. Agee, 474 S.W.2d 817, 822 (Mo. 1971); State v. Brownridge, 353 S.W.2d 715, 718 (Mo. 1962). In this connection it has been held that a punishment is not cruel simply because it is severe. Id. State v. Stubblefield, 157 Mo. 360, 58 S.W. 337, 339 (Mo. 1900).

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[8] Art. I, § 21, Mo. Const. provides: "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

When considering the constitutionality of a punishment statute enacted by our legislature, we presume its validity and those who seek to invalidate it bear a heavy burden of demonstrating that it is either barbarous or excessive. Gregg v. Georgia, supra, at 175 (1975); See State v. Mitchell, 563 S.W.2d 18, 26 (Mo. banc 1978).

We are mindful that the legislature necessarily considered those who have fallen victim to violent crime within our society. Their lives have been taken without notice and no rigorous procedural safeguards protected them from premeditated attack and death. No crime is more disruptive of peace and order or so violative of the rights of the individual as murder. The spread of violent crime threatens the basic fabric of our Republic and surely all right thinking persons recognize that physical security of its members is among the first objects of an organized society. We cannot say that the death penalty is cruel and unusual punishment for those who unlawfully, willfully, knowingly, deliberately, and with premeditation kill another human being. This view finds wide support in the legislative enactments of sister states, as forty jurisdictions attach a penalty of death to certain categories of murder.

Given the extreme nature of the crime of murder, as well as the fact that the overwhelming majority of American jurisdictions allow imposition of capital punishment in specific instances, we will not substitute our judgment for that of our duly elected legislature in this question of policy. We hold § 565.008, RSMo 1978 does not prescribe cruel and unusual punishment in violation of art. I, § 21 of the Missouri Constitution.

It is next asserted that the death penalty may not be invoked at Bullington's second trial because § 565.008.2(7), RSMo 1978, which provides one of the two aggravating circumstances the state seeks to

prove at retrial, is unconstitutionally vague and overbroad in violation of the fourteenth amendment.[9] The United States Supreme Court, confronted by a similar argument in Gregg v. Georgia, 428 U.S. 153, 201 (1976), as to a Georgia statute (Ga. Code Ann. § 27-2534.1(b)(7)) with provisions essentially the same as ours, concluded that while it was arguable any murder involves "depravity," the language need not be construed in such a broad fashion. Hence this statutory aggravating circumstance was not found so wanting in precision that it rendered the capital sentencing procedure capable of arbitrary and capricious decision violative of the eighth amendment. We see no reason to find that our almost identical statutory provision violates the fourteenth amendment particularly when the statute and its application is subject to mandatory review by the Missouri Supreme Court in all capital cases.

Respondent's final claim is that § 565.014.3(3), RSMo 1978, forbids the prosecution from seeking the death penalty at Bullington's second trial. That statute mandates proportionality review by this Court and that we determine in each case the excessiveness vel non of the death penalty's imposition.[10] We reject the contention that when a jury in the first trial of a capital murder case imposes a life sentence, assessment of capital punishment by any subsequent jury is invariably excessive. Such argument is little more than a variant of the double jeopardy argument dealt with earlier in this opinion, but respondent, pressing the contention, relies in the main on

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[9] Section 565.008.2(7) provides: "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."

[10] Section 565.014.3 provides that in the review of all cases in which capital punishment is imposed this Court shall determine: ". . .(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012, and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (Ga. 1977). Ward is distinguishable from the case at bar in that the evidence had been presented at the subsequent proceeding and that evidence "was essentially the same" as that presented at the first trial where the jury did not recommend a sentence of death. Id. at 366. No evidence has been adduced in the pending retrial of this cause and we will not indulge the speculation urged as to the State's or defendant's evidence at a future trial, this notwithstanding the argument that the "notice" contains the same general averments as the earlier "notice" and despite relator's statements in oral argument that the state intended to present the same evidence at Bullington's retrial. The evidence finally adduced depends upon the witnesses, not relator's expressed intention. Any rule or decisional pronouncement foreclosing on retrial additional proof in mitigation or aggravation within the scope of the notice, is quite unacceptable and we decline respondent's invitation to invoke such a rule as to a single phase of the proof, i.e., aggravation. More importantly we decline to follow the Georgia court in the construction of Missouri's death penalty statutes. Ward held that once a jury in a capital case finds life imprisonment, a jury sentence of death in any subsequent trial "is obviously disproportionate." Id. at 368. We are not persuaded to this point of view for a number of reasons. As noted above, not only may the proof vary in the second proceeding, but the jury which deemed a life sentence appropriate may well have been aberrant. It cannot be said that the findings of the first improper jury sound with finality as to aggravation or mitigation as our instructions explicitly allow the juror's individual values to be considered in the capital sentencing process. See MAI-CR 15.46. Also we have no record of the evidence from the first presentence hearing and cannot say what error may have occurred other than the fact the jury selection process

in Jackson County was constitutionally infirm. Further, if such record were before us the fact remains it would be impossible to predetermine the evidence emerging in the new trial and we consider it improper to predecide the result that should flow from the proof. Finally, if defendant's (respondent's) argument were accepted that the first jury's decision on punishment binds any later jury, the argument could be made that if the first jury decided on death as an appropriate sentence the second jury's consideration would be limited to only that punishment. Needless to say defendant would promptly abjure that result.

The rule is made absolute.

ALBERT L. RENDLEN, Judge

Morgan and Higgins, JJ., concur; Donnelly, J., concurs in separate concurring opinion filed; Welliver, J., concurs in result; Bardgett, C.J., dissents in separate dissenting opinion filed; Seiler, J., dissents in separate dissenting opinion filed.

Supreme Court of Missouri

en banc

DUPLICATE
OF FILING ON
FEB 11 1980
IN OFFICE OF
CLERK SUPREME COURT

STATE ex rel. GEORGE R. WESTFALL,)
)
Relator,)
)
vs.) No. 61499
)
HONORABLE DONALD L. MASON, Judge,)
16th Judicial Circuit,)
)
Respondent.)

CONCURRING OPINION

I would make a few observations on the issue of double jeopardy.

My Brother Seiler would, for constitutional purposes, and in a situation calling for a bifurcated proceeding, relate the prohibition against double jeopardy not only to the offense of capital murder of which Bullington was convicted but also to the punishment imposed for the offense of which he was convicted. He would reason that Bullington can be retried for the offense of which he was originally convicted because he waived the double jeopardy protection by attacking the validity of his conviction on Duren grounds--but Bullington cannot be subjected to a punishment greater than that assessed at his first trial because there was an implied acquittal of punishment by death.

In order to embrace such a position, capital murder must be treated as two offenses (capital murder where death may be imposed and capital murder where imprisonment for at least fifty years may be imposed) or it must be assumed that there are two "degrees" of capital murder (one sufficient to impose death and one not).

In my view, the discretion given by statute to assess punishment at less than death does not support either proposition. I find nothing in either constitution which would require that we construe capital murder as constituting two offenses or as being divided into degrees.

The jury finding in October 1978 that Bullington should be sentenced to life imprisonment without probation or parole for not less than fifty years was not a determination that any element of the offense of capital murder is lacking. The constraints of double jeopary are not involved here.

I would also make a few observations about imposition of the death penalty under § 565.008, RSMo 1978.

Article I, § 21 of the Constitution of Missouri provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." (Emphasis supplied.)

In my view, the taking of a life for a life is not always cruel. History teaches us that it is not unusual.

The taking of the life of a human being by another human being "unlawfully, willfully, knowingly, deliberately, and with premeditation" (§ 565.001, RSMo 1978) cannot be tolerated by organized society. Our Constitution promises that the "natural right to life" of all persons will be protected. Mo. Const. art. I, § 2.

The ultimate question is: May that protection be effected by the imposition of capital punishment? The arguments which swirl about us as to the validity of suggested justifications for the imposition of death as punishment (e.g., retribution and deterrence) make for fascinating reading but miss the mark. See S. Donnelly, A Theory of Justice, Judicial Methodology, and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility, 29 Syracuse L. Rev. 1109 (1978); and R. Gardner, Capital Punishment: The Philosophers and the Court, 29 Syracuse L. Rev. 1175 (1978).

However, it is my personal belief that an organized society that takes a life for a life as a part of its public policy is mistaken in its belief that it is promoting its own basic premise "that all government * * * is instituted solely for the good of the whole." Mo. Const. art. I, § 1.

Although I am compelled to concur, it is my view that taking the life of a human being "willfully, knowingly, deliberately, and with premeditation" (albeit "lawfully") by an organized society is socially

amoral. I think it will be self-destructive and that inevitably it will lower the quality of society and will be detrimental, if not devastating, to "the good of the whole." In warfare a fragile line sometimes exists between amoral killing and killing regarded as moral by world society. Here I think the line is not fragile but plain. Establishment of a studied public policy by which a whole community intentionally crosses the line into what I view as amoral killing, even though legal, represents a risk too great to itself for that community to assume.

In my view, banishment for fifty years (§ 565.008, RSMo 1978), with no concern for the probable fiction of rehabilitation, is an acceptable alternative. It would effectually excise the transgressor from our society without debilitating our society's collective concept of decency.

However, I have no authority to impose such views on the people of Missouri. To borrow from Mr. Justice Frankfurter: "As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting).

I have spoken of the death penalty in terms of <u>public policy</u>. It should be noted that constitutional concerns must be addressed by this Court, under authority of § 565.014, RSMo 1978, in each case where death is imposed as punishment.

I concur.

Robert T. Donnelly, Judge

Supreme Court of Missouri

en banc

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STATE ex rel. GEORGE R. WESTFALL,
Relator,
vs.
HONORABLE DONALD L. MASON, Judge, 16th Judicial Circuit,
Respondent,

No. 61499

DISSENTING OPINION

I dissent and concur in the dissenting opinion of Seiler, J. However, I wish to address the nature of our new capital-murder statute because I believe it differs in a substantive way from former murder statutes which permitted the death penalty as one of the punishments and thereby calls for different treatment by this Court.

Capital murder is not treated as two offenses. Nor do I think the dissent of Seiler, J., suggests that it is two offenses.

The old first-degree-murder statute, § 559.010, RSMo 1969, repealed Laws of Mo. 1975, p. 408, § A (hereinafter "old capital murder law") provided:

> 559.010. Murder in the first degree
> Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree. (Emphasis added.)

The punishment was to be arrived at and assessed in accordance with § 559.030, RSMo 1969, repealed Laws of Mo. 1975, p. 408, § A, which provided:

> 559.030. Trials for murder, verdict and punishment
> Upon the trial of an indictment for murder in the first degree, the jury must inquire, and by their verdict ascertain, under the instructions of the court, whether the defendant be guilty of murder in the first or second degree; and persons convicted of murder in the first degree shall suffer death, or be punished by imprisonment in the penitentiary during their natural lives; those convicted of murder in the second degree shall be punished by imprisonment in the penitentiary not less than ten years. (Emphasis added.)

The new capital-murder statute essentially copied the mental elements of the old capital-murder law, italicized supra, and designated the offense "capital murder" as follows:

> 565.001. Capital murder defined.--Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.[1] (L. 1977 H.B. 90 § 1) Effective 5-26-77

Elaborate procedures now appear in our laws whenever the death penalty is a possible punishment. §§ 565.006, 565.008, 565.012, 565.014, 565.016, RSMo 1978. The penalty section itself is § 565.008.1, RSMo 1978, and provides:

> 565.008. Death penalty, when imposed--life imprisonment, when imposed--minimum of fifty years to be served, when--first and second degree murder, penalties for.--1. Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

One must carefully read the numerous provisions relating to the procedures and required findings provided in the cited statutes to fully appreciate the qualitative difference between our old capital-murder law

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1. That part of repealed § 559.010, referring to homicides committed in the course of certain felonies "felony murder", became first-degree murder, § 565.003, RSMo 1978, punishable by life imprisonment, § 565.008.2, RSMo 1978.

and the present one. The differences are pointed up however by the case of State v. Tiedt, 229 S.W.2d 582 (Mo. banc 1950), a death-penalty case under our old law, when it is compared with the specific requirements of §§ 565.012.4 and 565.012.5, RSMo 1978.

In Tiedt, a jury found Tiedt guilty of "old" first-degree murder and assessed punishment at death. The only other penalty available was life imprisonment, § 559.030, supra, repealed. On appeal the defendant contended the trial court erred in refusing a certain instruction he tendered which would have told the jury that "' . . . the law relative to the right to receive the benefit of the doubt as to the severity of punishment'; that, if defendant was guilty of murder in the first degree, 'he was entitled to the benefit of a reasonable doubt * * * as to whether he should be given the death penalty or given a life sentence'; and that the 'same benefit of reasonable doubt should apply in fixing punishment as well as in determining whether any punishment should be assessed.'" Id. 585-6.

This Court held at 586: "The instruction was properly refused. If, under the evidence and instructions of the court, the jury found defendant guilty of murder in the first degree, it was for the jury to fix the punishment. The matter of punishment, within the limits fixed by the statute, was solely within the discretion of the jury under all of the facts and circumstances in evidence. Secs. 4378, 4092, R.S. 1939, Mo.R.S.A.; State v. Bevins, 328 Mo. 1046, 43 S.W.2d 432, 434; State v. Creighton, 330 Mo. 1176, 52 S.W.2d 556, 563; Ex parte Dusenberry, 97 Mo. 504, 11 S.W. 217. No question of reasonable doubt was involved in the matter of assessing the punishment. People v. Krauser, 315 Ill. 485, 146 N.E. 593, 605." (Emphasis added.)

The concept set forth in Tiedt that the death penalty could be validly imposed without any standards or directions was again approved in State v. Coleman, 460 S.W.2d 719 (Mo. banc 1970). But it was precisely

this "unbridled discretion" which caused the Supreme Court of the United States to declare this procedure unconstitutional in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). For a more detailed discussion of what was required by Furman and its progeny, see State v. Duren, 547 S.W.2d 476 (Mo.banc 1977), where this Court held unconstitutional a mandatory death penalty for capital murder.

The Missouri General Assembly subsequently adopted the present law. The essential and substantive difference is that, at least where the death penalty is a possibility, the jury first decides whether the defendant is guilty or not guilty of capital murder. Of course the state has the burden of proof and the defendant has the benefit of reasonable doubt. If the defendant is found guilty of capital murder, then the second stage of the trial takes place. Sec. 565.006, RSMo 1978. This is completely new in our criminal jurisprudence. Sections 565.012.4 and 565.012.5, RSMo 1978, require that before a death penalty can be assessed the jury must again be properly instructed, must find beyond a resonable doubt that at least one of the statutory aggravating circumstances exist, and must designate its finding in writing.

As pointed out in the dissent of Seiler,J., the instructions make it clear that the law requires that aggravating circumstances must be based on evidence and that the burden of proof is upon the state to prove the same beyond a reasonable doubt. MAI-CR 2d 15.40 and MAI-CR 2d 15.42.

The law requires affirmative findings beyond a reasonable doubt stated in a special verdict form before a death penalty can be imposed by the jury. The death penalty cannot result from a negative finding. The effect of our capital-murder law is that capital murder, without more, is punishable by life imprisonment without parole for fifty years. Capital murder plus an additional verdict of aggravating circumstances authorizes but even then does not compel the death penalty.

In view of the manner in which the legislature has dealt with the punishment for capital murder, which requires a separate finding and verdict by the jury if the death penalty is to be imposed, and because this is a new and unique procedure, we ought not try to fit this into any traditional molds of lesser-included offenses or degrees of homicide. The legislature has already done that by making significant and substantive differences in the penalty section of the capital-murder statutes. They have treated the death penalty as a punishment which is unique unto itself and not comparable to any term of imprisonment.

Under our capital-murder statutes, the crime may be punished by death if, and only if, the state carries its burden of proving beyond a reasonable doubt an element which is not necessarily part of the definition of capital murder. The jury does not decide this additional element when determining whether the defendant is guilty of capital murder. That additional element is the presence of a "statutory aggravating circumstance" which the jury may consider only <u>after</u> it finds the defendant guilty of capital murder and then only in those cases where the death penalty is sought. Thus what we have in Missouri is (1) capital murder punishable only by life imprisonment without parole for fifty years, and (2) capital murder plus at least one aggravating circumstance which may be but is not required to be punishable by death.

In this case the jury has already acquitted the defendant of whatever was necessary to impose the death sentence. This was done in a separate trial or hearing devoted only to that matter and in which the state had the burden of proof and the defendant had the benefit of reasonable doubt. Although it does not fit nicely into traditional concepts, it is clear that the jury has acquitted on the death penalty and the defendant is therefore not subject to retrial on that issue.

In short, the new capital-murder statutes allow a defendant to be placed in jeopardy of conviction of capital murder and then, after conviction, allow a defendant to be placed in additional and separate jeopardy of the death penalty. And this defendant, after being placed in such additional and separate jeopardy of being put to death, was acquitted of that death penalty.

I therefore dissent and would quash the preliminary rule in prohibition.

JOHN E. BARDGETT, Chief Justice.

THIS OPINION IS THE
MODIFIED DISSENTING OPINION
FILED ON MARCH 11, 1980.

Supreme Court of Missouri

en banc

DUPLICATE
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MAR 11 1980
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STATE ex rel. GEORGE R. WESTFALL,)
)
Relator,)
)
v.) No. 61499
)
HON. DONALD L. MASON, Judge, 16th)
Judicial Circuit,)
)
Respondent.)

DISSENTING OPINION

I respectfully dissent. The case at bar presents a defendant who was convicted of capital murder in a bifurcated trial wherein the jury first decides his guilt and, after finding him guilty, in a second stage decides whether the death sentence will be imposed. In this second stage, pursuant to statute, the state presented evidence of aggravating circumstances and the defendant presented evidence of mitigating circumstances for the jury's consideration in determining whether to impose the death sentence. The jury determined a single issue, whether the facts marshalled by the state affirmatively justified the imposition of the death sentence on Robert Bullington.[1] The jury found against the state, deciding that none of the possibilities presented warranted the death sentence. The state now demands that it again be permitted to present the same facts to a second jury with the hope that the new jury will decide to execute the defendant.

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1. The Missouri Approved Criminal Instruction submitted to the jury for this finding, MAI-CR 15.40 "Guilty of Capital Murder: Statutory Aggravating Circumstance - Finding Required for Death Penalty," with the two aggravating circumstances proffered by the prosecuting attorney would have read as follows:

"In determining the punishment to be assessed (under Count ____) against the defendant for the

(Continued)

Three times during his oral argument before this court, the prosecuting attorney conceded that the state would offer the same evidence in support of its demand that Robert Bullington be sentenced to death.[2] The principal opinion will permit the state to relitigate a jury's determination that the death sentence is inappropriate whenever a defendant sentenced to life imprisonment succeeds in overturning an unconstitutional capital conviction.

The principal opinion does not distinguish the very different cases presented by single stage trials and the bifurcated trial required for the imposition of the death penalty. By not distinguishing the cases, the analysis overlooks the unanimous authority denying

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(Continued)

> murder of [*name of victim*], you must first unanimously determine
>
> "Whether the defendant has a substantial history of serious assaultive convictions.
>
> "Whether the murder of [*name of victim*] involved torture or depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.
>
> "You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.
>
> "Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence."

2. The statement in the principal opinion that it is speculative as to what the state's evidence on aggravation will be on retrial is contradicted by the statements of the prosecuting attorney who will again try the case for the state. There is no reason why we should doubt the prosecutor's knowledge of his case.

the state a second jury determination as to the death penalty once a jury singularly and affirmatively finds that the defendant is not to be put to death. The cases cited as authority in the principal opinion go back more than fifty years, long prior to establishment of present day standards and requirements which make a death penalty case unique. There has never been anything like it before. The cases relied on by the principal opinion all involve single stage proceedings and do not encompass or address in any respect the issues and complexity presented by the two separate trial stages required by the more recent United States Supreme Court cases for conviction and sentencing of the capital murder offense. The only cases directly in point, not all of which are discussed by the principal opinion, reach an opposite result.

I

In 1976, the United States Supreme Court upheld the constitutionality of Georgia's bifurcated trial procedure for capital offenses in Gregg v. Georgia, 428 U.S. 153 (1976). In a companion case, Woodson v. North Carolina, 428 U.S. 280 (1976), the Supreme Court held unconstitutional North Carolina's mandatory death penalty statute for first-degree murder. In Woodson, the plurality opinion stated that the Constitution requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." 428 U.S. at 303.

In 1977, the Missouri legislature enacted a bifurcated trial procedure for capital offenses, now §§ 565.008 and 565.012, RSMo 1978, patterned on the Georgia statute upheld in Gregg. The Georgia statute, Ga. Code §§ 27-2503 and 27-2534.1 (1975), provides for a trial in two stages, one for a determination of guilt, and a second for a determination as to whether the degree of the convicted defendant's guilt justifies his execution. Under both statutes, a jury that convicts a defendant of capital murder in the first stage must then in the second stage hear new evidence and determine whether the defendant's guilt will be punished by a life sentence or whether his guilt is such that he should be put to death.

In the instant case, the principal opinion apparently finds that this determination by the jury in the second stage of trial is merely assigning punishment within the range provided by statute and not a finding of what is required to justify the death penalty. But in Woodson, the Supreme Court rejected this view: "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two." 428 U.S. at 305 (emphasis added).

The principal opinion makes much of the fact that there is but one crime of capital murder and refuses to acknowledge that the statutory framework treats capital murder markedly different than any other crime. It is true that § 565.001, RSMo 1978, defines capital murder. But taken alone it is incomplete. Without a penalty being prescribed, it is no more than an abstract declaration of law. A killing may be unlawful, willful, knowing, deliberate and premeditated, yet that is not all capital murder encompasses. In addition to guilt, there must also be found by the jury, beyond a reasonable doubt, aggravating circumstances which the jury must designate in writing in its verdict. Capital murder is meaningless without the punishment. There is no such thing as a conviction of capital murder per se without more. It has to be either capital murder with death or capital murder with life imprisonment, without probation for fifty years, etc. This does not "rend" the crime of capital murder. Rather, it recognizes what we all know to be the fact.

The statutes dealing with the crime provide for a unique two stage proceeding and require that the jury must affirmatively find beyond a reasonable doubt additional aggravating circumstances before it can impose the death penalty. By requiring that the additional element of aggravating circumstances be proven beyond a reasonable doubt for the imposition of the death penalty, the statutory framework effectively establishes the crime of aggravated capital murder

punishable by death and the crime of capital murder punishable by life imprisonment without the possibility of probation or parole for fifty years. The legislature had no choice but to enact two degrees of punishment for the crime of capital murder. Had the legislature separated the degrees into two separate offenses, with one of a higher degree punishable only by death, the statute would have been unconstitutional under Woodson as a mandatory death penalty statute.

Accordingly, this case presents much more than the potential for enhanced punishment upon retrial under a single-verdict procedure. The issue in this case is whether, under the bifurcated trial procedure for capital cases, the state can ignore the jury's implicit acquittal of the defendant of what is required to justify imposition of the death penalty and on retrial once again ask a jury to find what it considered and declined to find in the first trial.[3]

The principal opinion would smudge the question of what issue the jury decided in the first trial when it gave defendant life imprisonment instead of death. The principal opinion speculates that perhaps the jury "intuitively" found the mitigating circumstances outweighed the aggravating circumstances or that perhaps the jury's "predilections as to mercy" explain the verdict or that perhaps it was in response to "a defendant's plea for mercy rather than finding no aggravation." There is no way we can know what may have subjectively impelled the jury to reject death and agree on life imprisonment. What we do know is that the jury has resolved the issue under instructions which, as pointed out below, presented it with a single, narrow issue for decision. The only "single rationally conceivable issue in dispute before the jury", Ashe v. Swenson,

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3. Even a cursory glance at the Missouri Approved Criminal Instructions for the second stage in capital murder trials, after a jury has already convicted the defendant, indicates that a jury determination to impose a life sentence is an implied acquittal of the aggravated capital murder which would justify the imposition of the death penalty. The "Supplemental Notes on Use Applicable to the 15.00 Series of MAI-CR" (for homicides committed after May 25, 1977) requires the reading of: MAI-CR 15.30, 15.32 and 15.34 in the opening of the second stage before the presentation of evidence; MAI-CR 15.36 after the presentation of evidence and before argument; and, MAI-CR 15.38, 15.40, 15.42, 15.44, 15.46 and 15.48 after argument. Finally, a special verdict form, MAI-CR 15.56.2, is presented to the jury for its determination of the question.

397 U.S. 436, 445 (1969), after guilt was decided, was whether this defendant was to receive death or life imprisonment under the terms and conditions of the instructions given.

MAI-CR 15.30 instructs the jury that "at this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for the offense."

MAI-CR 15.32 instructs the jury it is to go to the jury room, "deliberate and arrive at your verdict fixing the punishment to be imposed upon the defendant."

MAI-CR 15.36 instructs the jury "it is your duty and yours alone to decide upon the punishment to be imposed upon the defendant. . ."

MAI-CR 15.40 concludes by instructing the jury, "Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that the foregoing circumstance exists and that it is an aggravating circumstance,[4] you must return a verdict fixing the punishment of the defendant at imprisonment for life. . ."

The same is true with respect to MAI-CR 15.42, which requires a verdict of life imprisonment if the jury does not find the aggravating circumstances are sufficient to warrant death.

MAI-CR 15.44 requires the jury to return a verdict of life imprisonment if the mitigating circumstances outweigh the aggravating circumstances.

Finally, MAI-CR 15.46 tells the jury that even if the mitigating circumstances do not outweigh the aggravating circumstances, the jury is not compelled to arrive at a death verdict.

Therefore, the verdict of life imprisonment in the first trial had to mean one of four things:

1. The jury did not find aggravating circumstances, or
2. It did not find the aggravating circumstances were sufficient to warrant death, or
3. The mitigating circumstances outweighed the aggravating circumstances, or
4. Even if they did not, the aggravating circumstances were not sufficient.

4. The instruction can be reworded slightly to cover the situation where there are several aggravating circumstances submitted, at least one of which must be found.

To use the language of Ashe, supra, this jury, under the instructions, could not have grounded its verdict as to life or death upon an issue other than that which the defendant seeks to foreclose from consideration - namely, that under the facts presented by the state, which the prosecution says will be the same on retrial, none of the possibilities warranting the death sentence existed.

This case raises squarely the issues of the rule of collateral estoppel embodied in the fifth amendment guarantee against double jeopardy as enunciated in Ashe v. Swenson, supra. In Ashe, the Supreme Court held that the applicability of the rule in criminal cases "'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" 397 U.S. at 444 (citing Sealfron v. United States, 332 U.S. 575, 579). Viewed with an eye to all the circumstances of the proceedings, the case at bar presents a prior jury determination of "the single rationally conceivable issue in dispute", whether the defendant's guilt was such as to justify the death penalty. See Ashe, Id. at 445. Because the jury in the second stage of the trial found that the aggravating circumstances were either not present or were insufficient, the state should not be given a second chance to present the question to another jury.

II

Three state supreme courts have addressed the precise issue before this court, each of which held impermissible the state's attempt to relitigate at a second trial whether the convicted defendant's guilt justified the death penalty after the first jury decided the death penalty was not justified. Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977); Commonwealth v. Littlejohn, 433 Pa. 336, 250 A.2d 811 (1969); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

In Ward v. State, supra, the Georgia Supreme Court found the imposition of the death penalty in the second trial unlawfully disproportionate to the life sentence imposed by the first jury. The court found the disparity in sentences impermissibly dispropor-

tionate under Ga. Code § 27-2537(c)(3)(1975), which is word for word the same language contained in Missouri's statute providing standards for review of death penalty cases, § 565.014.3(3), RSMo 1978, as well as under the United States Supreme Court's standards in Gregg v. Georgia, supra.[5] The Georgia court concluded:

> "The same defendant was tried previously on the same charges and the jury imposed a life sentence. Therefore the death sentence in the case under review is obviously disproportionate to the life sentence previously imposed against the same defendant in the same case. Accordingly, the law requires us to vacate the death sentence and direct the impositon of a life sentence. . . . To do otherwise would be incongruous and contrary to the clear mandate of the law. For as was said by the United States Supreme Court in Gregg, '[t]he provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by action of an aberrant jury.' Gregg, supra, 428 U.S. at 206, 96 S.Ct. at 2940."

236 S.E.2d at 368. Because the Georgia and Missouri statutes providing standards for review of death penalty cases are almost identical, this case is certainly persuasive authority for denying the state on retrial a second chance to litigate its demand that the defendant be put to death once the first jury decides the issue against the state.

In the case at bar, the principal opinion attempts to distinguish the Ward case "in that the evidence had been presented at the subsequent proceeding and that evidence 'was essentially the same' as that presented at the first trial where the jury did not recommend a sentence of death." But as noted above, the prosecuting attorney in this case conceded during oral argument that the state's evidence in a second trial would be the same as that presented at the first trial. The principal opinion also says that the fact the "notice" required by §565.006-2 as given in the instant case contains the same general averments of aggravation as

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5. In Gregg v. Georgia, 428 U.S. 153, 187 (1976), the Supreme Court held, among other things, that the imposition of the death penalty cannot be disproportionate in relation to the crime for which it is imposed.

the earlier notice should not be held to foreclose additional proof within the scope of the notice. But that is not defendant's contention. The prosecuting attorney, himself, has told us that the state's evidence in the second trial will be the same as that presented at the first trial. It is not a matter of what the scope of the notice allows. The fact is that the prosecutor, who is in a better position to know than we are, has conceded the evidence will be the same. This makes the cases virtually identical and the result reached in Ward all the more persuasive.

In Commonwealth v. Littlejohn, supra, the Pennsylvania Supreme Court held that the constitutional provisions relating to due process, equal protection and double jeopardy precluded the Commonwealth from seeking the death penalty in a second bifurcated trial against a defendant sentenced to life imprisonment in the first trial. The court found that exposing a defendant who appeals from a life sentence to a second possibility of receiving the death sentence at a new trial violates due process by conditioning the right of appeal.

> "The prisoner must decide whether to abandon his constitutional right to a fair trial and serve out his prison term under an invalid or unchallenged sentence, or exercise his statutory right to appeal in order to achieve his constitutional right to a fair trial, at the risk that his second trial might result in the imposition of the death penalty. This makes the price of appeal from an erroneous judgment in a first degree murder case the risk of a man's life. . . ."

250 A.2d at 813-14. The court found that "this choice not only shocks the conscience and offends our sense of justice, but also rises to an unconstitutional condition" under United States v. Jackson, 390 U.S. 570 (1968).[6] Id. at 814.

The Pennsylvania court also found a violation of equal protection on the ground that of all defendants sentenced to life imprisonment, only those who appealed their sentences would be singled out for the possible imposition of the death penalty:

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6. In United States v. Jackson, 390 U.S. 570 (1968), the Supreme Court held invalid as an unconstitutional condition a provision in the Federal Kidnapping Act, 18 U.S.C. § 1201(a), which provided that a defendant who chose to be tried by a jury was subject to the death penalty, but a defendant who waived his right to a jury trial gained immunity from the death sentence.

> "It is our view that the equal protection clause of the fourteenth amendment also prohibits the Commonwealth from imposing the threat of the death penalty on those who have been convicted of first degree murder and sentenced to life imprisonment. . . . [I]nstead of choosing a group for sentence review on the basis of some factor which bears a rational connection with the purpose of review, this system employs a completely irrational standard for choosing those whose sentences may be changed.
>
> "Further, . . . if the Commonwealth's purpose is to eliminate frivolous appeals, employing the deterrent of an increased sentence does not represent a rational standard. . . . The device of the threat of the death penalty does not bear any reasonable relation to the frivolousness or merits of the appeal."

250 A.2d at 815.

In Littlejohn, the Pennsylvania court also found a violation of the double jeopardy clause under the principle enunciated in Green v. United States, 355 U.S. 184 (1957). In Green, the United States Supreme Court held that a defendant, who had been convicted of second degree murder and successfully had that conviction reversed, could not be tried again for first degree murder. The court reasoned that the first jury, by returning a verdict of second degree murder, had impliedly acquitted the defendant of the first degree charge. In applying Green to the bifurcated trial and circumstances presented in Littlejohn (the circumstances presented this court in the case at bar), the Pennsylvania Supreme Court held that the double jeopardy clause prevented a prosecution for the higher punishment, namely, death rather than imprisonment, once the defendant has been convicted of and received the less severe punishment. Id. at 816.

In People v. Henderson, supra, the California Supreme Court held that in a bifurcated trial the prohibition against double jeopardy precluded the imposition of a death sentence upon a defendant after the reversal of the first judgment sentencing him to life imprisonment. Mr. Justice Traynor, writing for the court, reasoned that since Green v. United States, supra, established that a reversed conviction of a lesser degree of a crime precludes conviction of a higher degree on retrial, "[i]t is immaterial to the basic purpose of the constitutional provision

against double jeopardy whether the legislature divides a crime into different punishments or allows the court or jury to fix different punishments for the same crime." 386 P.2d at 686. The California court also found that the death penalty threat imposed unreasonable conditions on the right to appeal:

> "A defendant's right to appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal."

Id.

The principal opinion does not discuss the Littlejohn and Henderson cases.

In the case at bar, the principal opinion relies on Gully v. Kunzman, 592 F.2d 283 (6th Cir.) cert. denied, 99 S.Ct. 2850 (1979) as authority for its statement that the fifth amendment does not forbid imposition of the death penalty on retrial of defendant for an offense upon which he was originally sentenced to life. But the Gully decision did not involve a bifurcated trial with a second stage for determining whether the degree of guilt justified the death penalty:

> "The new death penalty statute was not employed at petitioner's first trial. Indeed, the option of sentencing petitioners to death was not even submitted to the sentencing authority at the trial. Accordingly, the fact that petitioners received only a life sentence after the first trial cannot be interpreted as 'an implicit acquittal' of the 'greater' offense created by the new death penalty law. See Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)."

592 F.2d at 289 (emphasis added). Because Gully did not involve a specific jury finding that the defendant's degree of guilt did not justify the imposition of the death penalty, the Gully case is clearly distinguishable.[7] In fact, the Gully case actually supports the view

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7. For the same reason, the principal opinion places undue reliance on Stroud v. United States, 251 U.S. 15 (1919) and Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (a robbery conviction that did not involve the imposition of the death penalty, both cases involving only single stage trials).

(Continued)

that, in a bifurcated trial, the imposition of a life sentence by the jury in the second stage is for the purposes of double jeopardy analysis an implied acquittal of aggravated capital murder punishable by death:

> "We do not think this analysis far-fetched, since, under the new scheme, a defendant convicted of a capital offense may not be sentenced to death except upon a finding, 'beyond a reasonable doubt,' of certain statutorily-prescribed 'aggravating factors.' These 'factors' might be conceived of as elements of the 'greater' crimes of 'captial murder/armed robbery' rather than simply as guides for the exercise of the sentencing authority's discretion to fix an approximate punishment for one convicted of 'simple' willful murder and armed robbery."

Id. In any event, Gully is not authority for permitting the state to expose the defendant to the risk of the death penalty after a jury has implicitly acquitted him of guilt justifying the imposition of the death sentence.

As the review of the Ward, Littlejohn, Henderson and Gully cases indicates, the case at bar presents questions of due process, equal protection, and double jeopardy. I am convinced that the second exposure of this defendant to the potential of the imposition of the death penalty, after a jury in the second stage of a bifurcated trial singularly and affirmatively decided that the defendant is not to be put to death, would violate the fifth and fourteenth amendments of the United States Constitution, the due process clause of the Missouri Constitution, art. I, § 10, and § 565.014.3(3), RSMo 1978.

(Continued)

The principal opinion contends that Chaffin, despite the fact it involved only a single stage trial, nevertheless supports the proposition that the state may again seek the death penalty when defendant is tried before the second jury in the case before us, pointing out that Chaffin said that "bifurcation alone would not wipe away the fundamental differences between jury and judicial sentencing."

There was no bificurated trial in Chaffin and the Chaffin opinion does not purport to deal with the problems which are raised by the instant case, tried as it was under our system of instructions which focus the jury upon a single issue in the second stage proceedings, as discussed earlier herein.

III

The result reached in the principal opinion infringes upon both the right to appeal and the right to a jury trial. Moreover, this result is fundamentally unfair where, as here, the necessity of the second trial is caused by the state's errors.

A

The Bill of Rights portion of the Missouri Constitution provides in art. I, § 14 "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person. . ." This section has been interpreted by this court "to protect citizens in enforcing rights recognized by law, without discrimination." Schulte v. Missionaries of LaSalette Corporation, 352 S.W.2d 636, 641 (Mo. 1961). In the case at bar, the defendant was originally convicted unconstitutionally and he succedded in overturning his conviction. His right to a fair trial had been denied him. The principal opinion effectively holds that this defendant, and others similarly spared the death sentence by a jury in the second stage of a capital trial, must forfeit the jury's implied acquittal of the death penalty in order to challenge an unconstitutional conviction. This result obviously discriminates against persons who attempt to enforce their rights to be free from unconstitutional convictions. This discrimination and infringement upon the right of appeal, by forcing a person unconstitutionally convicted to risk the imposition of the death sentence in order to vindicate his rights, violates Mo. Const. art. I, § 14.

B

Aside from infringing the right of appeal, the result reached under the principal opinion will chill the exercise of defendant's right to a jury determination in the second stage of trial. This result will arise when the defendant is forced to choose whether he will exercise his right to a jury trial or settle for sentencing by the trial judge to avoid the possible imposition of the death penalty upon retrial.

In North Carolina v. Pearce, 395 U.S. 711 (1969), the United States Supreme Court held that when a defendant has succeeded in obtaining a new trial, the due process clause prevents a sentencing judge from imposing a harsher sentence on the defendant if he is convicted in the second trial, absent any identifiable misconduct by the defendant between the time of the first and second trial. The Supreme Court held:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."

395 U.S. at 725-26.

The general sentencing provisions of the new criminal code permit a defendant to request "in writing that the court assess punishment in case of a finding of guilt" by the jury. § 557.036.2, RSMo 1978. If the defendant waives jury sentencing and, therefore, is sentenced instead by the judge in the event of a finding of guilt, the judge will be bound by the holding of North Carolina v. Pearce, supra. Accordingly, a defendant given life imprisonment by the jury after a capital conviction may, if he succeeds in obtaining a new trial, limit the maximum sentence in the second trial to life imprisonment by waiving jury sentencing in the second trial.[8]

---

8. This strategy forces the defendant to run the risk, however, that if the jury in the second trial finds the defendant guilty of a non-capital offense, the judge may impose a harsher sentence than the jury would have imposed on him.

As a result of the holding in the principal opinion, a defendant who obtains a new trial after being sentenced to life imprisonment in a bifurcated capital murder trial will be forced, in the second trial, to waive his right to jury trial guaranteed under the sixth amendment, Duncan v. Louisana, 391 U.S. 145 (1968), the Missouri Constitution, art. I, § 22(a), to avoid putting his life in jeopardy once again. Only if the defendant waives his right to a jury determination in the second stage of trial can he avoid being forced to run the gauntlet until the state succeeds in its efforts to take his life. Consequently, the result reached today erects the same framework impairing the right to a jury trial which was held unconstitutional in United States v. Jackson, supra.

In Jackson, the United States Supreme Court held unconstitutional the provision in the Federal Kidnapping Act, 18 U.S.C. § 1201(a), which provided that a defendant who chose to be tried by jury was subject to the death penalty, but a defendant who waived his right to a jury trial gained immunity from the death penalty. Like the defendant in Jackson, the defendant in the case at bar is subject to the death penalty if he chooses to be tried by jury in the second stage of trial, but gains immunity from the death penalty if he waives his right to jury sentencing. As in the unconstitutional framework in Jackson, under today's decision the defendant, if "ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." 390 U.S. at 581. But the Supreme Court found this result "needlessly chill[s] the exercise of basic constitutional rights." Id. at 582.

C

There is another consideration, too. It is basically unfair to permit the state, after it has failed to obtain a death sentence, and after a new trial has been awarded because of the state's errors, to keep trying the defendant over and over for the death penalty. Even where his life is at stake, the defendant cannot match the resources of the state and sooner or later the state will prevail.

The principal opinion contends that if the first jury's decision on punishment binds any later jury, "the argument could be made that if the first jury decided on death as an appropriate sentence the second jury's consideration would be limited to only that punishment." While there may be surface appeal in this proposition, the argument ignores long-standing constitutional principles. In United States v. Ball, 163 U.S. 662, 671 (1896), the United States Supreme Court unequivocally stated that a "verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." And in Green v. United States, supra, the Supreme Court made clear that an implied verdict of acquittal of a greater offense, as when the jury convicts the defendant of a lesser offense, enjoys the same finality and insulation from review as an outright acquittal. In the case at bar, the court is presented with the jury's implied acquittal of capital murder with the death penalty, as the jury refused to find in the second stage of trial that the state's proffered aggravating circumstances justified putting the defendant to death.

The Missouri capital murder statutes require that the jury pass on whether defendant is to be found guilty of capital murder with the death penalty or capital murder with life imprisonment without eligibility for probation or parole for fifty years. Once the issue is decided in the defendant's favor, whether by an outright acquittal as in United States v. Ball, supra, or by an implied acquittal as in Green v. United States, supra, the dispute as to the question is ended "then and there." See United States v. Jorn, 400 U.S. 470, 484 (1971). "[T]here is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous,' . . . the legal rulings leading to that judgment might be." Sanabria v. United States, 437 U.S. 54, 75 (1978). In Green, the Supreme Court flatly rejected the government's contention that the defendant

"must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced. . ." 355 U.S. at 193-94.

In any event, it would not be sound for the court to decide the actual issues presented in this case on the basis of speculation as to the result we would reach in a hypothetical case. The principal opinion has postulated a nonexistent contingency - that of a case where defendant was given death - different from the facts before us, the legal questions of which nonexistent case have neither been briefed nor argued. If this anticipated issue were to arise, this court may decide the case after the issue is timely briefed and argued. I would decide the question when it arises; it is not an issue in this case.

V

Although the principal opinion states at the outset that the "principal question for our determination is whether on retrial the death penalty . . . is barred as possible punishment by constitutional or statutory consideration"[9] and concludes that the trial court would be exceeding its authority in denying the state leave to seek imposition of the death penalty on retrial and hence prohibition lies, the opinion also addresses the constitutionality of the death penalty. That point is not raised in relator's original brief in any way. Counsel for respondent in his brief predicts that the death penalty will in due course be held unconstitutional, but that they will "say no more here than enough to make the point, in order to preserve it for appeal" (obviously referring to the appeal which may come after the retrial of the capital murder case), and then argues that §565.012.2(7), RSMo 1978, one of the statutory aggravating circumstances proffered by the state in its effort to impose the death penalty on defendant, is unduly broad and vague. Relator, then, in his reply brief "suggests that the instant proceeding is not the proper time to

9. It is important to bear in mind that the constitutional issue referred to is not the constitutionality of the death penalty, but whether it is constitutional to subject defendant to the death penalty on retrial after the jury in the first trial had rejected the death penalty and given the defendant life imprisonment.

consider th s particular issue. Whether the statute is overly broad can be better determined when the Court has a case on appeal with a full transcript of the proceedings to assist it." Neither side purports to have briefed or argued these last two constitutional questions thoroughly or adequately.

The present action is in prohibition and once the question of whether the trial judge will exceed his jurisdiction if he goes through with his intention to sustain defendant's motion to strike is determined, the prohibition action is settled. Clearly respondent is not contemplating making that order for the reason he considers the death penalty unconstitutional, because he permitted the death penalty issue to be tried in the first trial. Respondent is contemplating making the order for the reason that defendant was subjected to the death penalty in the first trial, but the jury rejected it, and hence defendant cannot be subjected to it again in the second trial, respondent believes. To go further and reach out to decide the constitutionality of the death penalty under art. I, § 21 of the Missouri Constitution is to violate our long established rule that we abstain from passing on constitutional questions which are unnecessary to a disposition of the case. See the many cases so holding collected in 7 West's Missouri Digest, Constitutional Law, Key No. 46 (1).

I would await a case where the death penalty is squarely before us on direct appeal, with adequate briefing and argument, to pass on its constitutionality. We should not casually foreclose a question of this magnitude.

Additionally, the questions of whether the statutory aggravating circumstances are unconstitutional as unduly broad and vague, and whether the death penalty would be unconstitutional as cruel and unusual punishment if applied to this defendant are questions not ripe for adjudication, as this defendant has yet to stand trial, and we do not know what the outcome of the second trial may be. Defendant may

not receive the death penalty in a second trial, even if the present case goes against him, nor do we know what evidence defendant may offer as to the cruel and unusual aspects of the death penalty. These are all questions properly addressed on appeal. "[P]rohibition cannot be substituted for an appeal." State ex rel. Vogel v. Campbell, 505 S.W.2d 54, 58 (Mo. banc 1974). I would quash the preliminary rule.

Robert E. Seiler, Judge

EXHIBIT C

INSTRUCTION NO. 30

You have found the defendant guilty of capital murder. At this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for that offense.

The punishment prescribed by law for capital murder is either death or imprisonment for life by the Division of Corrections without eligibility for probation or parole until the prisoner has served a minimum of fifty years of his sentence.

MAI-CR 15.30

INSTRUCTION NO. 37

This stage of the trial will proceed as follows:

First, the Court will read to you one further instruction of law for your guidance. Next, the attorney for the state must make an opening statement outlining what evidence the state expects to introduce at this time with respect to the punishment to be imposed. The defendant's attorney is not required to make an opening statement then or at any other time. However, if he chooses to do so, he may make an opening statement after that of the state, or he may reserve his opening statement until the conclusion of the state's evidence.

Evidence will then be introduced which, with the evidence you have already heard, may be considered by you insofar as it bears upon the punishment to be fixed by the jury.

Next, the attorneys may make their arguments to you regarding the punishment to be imposed, after which the Court will read to you further written instructions concerning the law applicable to this stage of the proceedings.

You will then be given the written instructions of the Court to take with you to your jury room. You will go to that room, deliberate and arrive at your verdict fixing the punishment to be imposed upon the defendant.

MAI-CR 15.32

It is your duty to follow the instructions and the law as the Court gives them to you. However, no statement, question, ruling or remark that I have made or may make during the entire trial is intended to indicate my opinion of what the facts are or what the punishment should be. That will be your responsibility. In performing that duty you alone must decide upon the believability of the witnesses and the weight and value of the evidence.

You will recall that the Court told you at the first stage of this trial that you must not assume as true any fact solely because included in or suggested by a question asked a witness. A question is not evidence, and may be considered only as it supplies meaning to an answer.

MAI-CR 15.34

You will now hear argument by the prosecuting attorney and by counsel for the defendant regarding the punishment to be imposed. Their arguments are intended to help you in understanding the evidence and applying the law, but they are not evidence.

You will bear in mind that it is your duty to be governed by the evidence as you remember it, the reasonable inferences which you believe should be drawn, and the law as given in instructions of the Court.

After counsel have argued the matter, the Court will give you further and final instructions concerning the law relating to the punishment. It is your duty and yours alone to decide upon the punishment to be imposed upon the defendant and to render such verdict under the law and the evidence.

The state's attorney must open the argument. Counsel for the defendant may then make his argument. No further argument is permitted by either side.

MAI-CR 15.36

The law applicable to this stage of the trial is stated in these instructions and those which were read to you when we began this phase of the case. All of these instructions will be given to you to take to your jury room for use during your deliberations.

You must not single out certain instructions and disregard others or question the wisdom of any rule of law.

I do not mean to assume as true any fact referred to in these instructions but leave it to you to determine what the facts are and what the punishment should be.

MAI-CR 15.38

In determining the punishment to be assessed under Count I against the defendant for the murder of Pamela Sue Wright, you must first unanimously determine:

1. Whether the defendant has a substantial history of serious assaultive convictions.

2. Whether the murder of Pamela Sue Wright involved depravity of mind and that as a result thereof it was outrageously or wantonly vile or horrible or inhuman.

You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance or circumstances found to exist, you are not compelled fix death as the punishment. Whether that is to be your final decision rests with you.

INSTRUCTION NO. _____

If you find and believe from the evidence beyond a reasonable doubt that one or more of the circumstances submitted in Instruction No. _____ exists and that at least one of them is an aggravating circumstance, it will then become your duty to decide whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as punishment of defendant. In deciding that question you may consider all of the evidence relating to the murder of Pamela Sue Wright.

You may also consider any of the aggravating circumstances referred to in Instruction No. _____ which you found beyond a reasonable doubt.

If you do not unanimously find from the evidence beyond a reasonable doubt that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

MAI-CR 15.42

You will be provided with forms of verdict for your convenience. You cannot return any verdict as the verdict of the jury unless all twelve jurors concur in and agree to it, but it should be signed by your foreman alone.

If you decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Pamela Sue Wright, your foreman must write into your verdict all of the aggravating circumstances submitted in Instruction No. _____ which you found beyond a reasonable doubt.

If, after considering all of the evidence and instructions of law, you decide that the defendant must be punished for the murder of Pamela Sue Wright by imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence, your foreman will sign the verdict form so fixing the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the court.

If, after due deliberation, you are unable to agree upon the punishment, your foreman will sign the verdict form so stating. In such case, the court will fix the defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.

VERDICT FORM

Jurors: Use this form only if the punishment fixed by you is death. See Instruction No. _____ for directions as to what must be written into the verdict form if the death penalty is imposed. Use the reverse side of this form if necessary. The foreman's signature must appear at the end of the matter which you designate in writing as the aggravating circumstance or circumstances which all twelve jurors found beyond a reasonable doubt.

As to Count I, we, the jury, having found the defendant guilty of the capital murder of Pamela Sue Wright, fix the defendant's punishment at death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt:

MAI-CR 15.56

VERDICT FORM

As to Count I, we, the jury, having found the defendant guilty of the capital murder of Pamela Sue Wright, fix the punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until the defendant has served a minimum of fifty years of his sentence.

_____
FOREMAN

MAI-CR 15.56

As to Count I, we, the jury, having found the defendant guilty of the capital murder of Pamela Sue Wright, are unable to agree upon the punishment.

FOREMAN

MAI-CR 15.56

EXHIBIT D
AMENDMENTS TO THE UNITED STATES CONSTITUTION

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV.

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

No. 79-6740

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT BULLINGTON,

Petitioner

—*v.*—

STATE OF MISSOURI,

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

JOINT APPENDIX

RICHARD H. SINDEL
SINDEL, SINDEL & SINDEL
15A N. Meramec, Suite 200
Clayton, Missouri 63105
(314) 721-6040

Counsel for Petitioner

JAMES COOK
Assistant Prosecuting Attorney
7900 Carondelet
Clayton, Missouri 63105
(314) 889-2587

Counsel for Respondent

PETITION FOR CERTIORARI FILED JUNE 9, 1980.
CERTIORARI GRANTED OCTOBER 6, 1980.

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7-26-78 Amendment of the Information

10-2-78 Trial in Circuit Court, Jackson County commences

10-11-78 Trial Resumes. Some parties appear; same jury appears. Instructions 3 through 29, read to jury. Final argument by State and Deft. Jury to Jury Room with Instructions through 29, inclusive, and verdict forms at 2:45 P.M. to begin deliberations. Jury returns at 9:30 P.M. with the following verdicts: "As to Count I, we, the jury, find the defendant, Robert Bullington, guilty of Capital Murder, as in Instructions No. 10. /s/ T. William Lowry, Foreman."

10-12-78 Penalty portion of Trial begins. Same parties appear; same jury appears. State's evidence begins and concludes. Deft. adduces no evidence. Court reads Instructions 30, 31, and 32 to jury prior to introduction of evidence. After evidence Court reads Instructions 33 through 39, inclusive to jury. Argument made by State and Deft. Jury to jury room with instructions 30 through 39, inclusive at 3:00 P.M. to deliberate penalty. Jury returns at 3:50 P.M. with following verdict on Count I: "As to Count I, we, the jury, having found the deft. guilty of the capital murder of Pamela Sue Wright, fix the punishment at imprisonment for life by division of corr., without eligibility for probation or parole until the deft. has served a minimum of fifty years of his sentence. /s/ T. William Lowry, Foreman."

11-20-78 Defendant files Motion for Judgment of Acquittal or in the Alternative for a New Trial

2-13-79 Order: Deft.'s Motion for Judgment of Acquittal be overruled and deft.'s Motion for New Trial be sustained on the ground stated in paragraph 46 of the New Trial Motion. The cause is transferred to criminal Docket "A" for reassignment.

3-1-79 Asst. Prosecuting Attorney of Clayton, Missouri, files Notice of Evidence in Aggravation

3-14-79 Attorney for Defendant files Motion to Strike Plaintiff's Notice of Evidence in Aggravation and to Exclude from Trial Evidence in Aggravation of Punishment.

5-17-79 Petition for Writ of Mandamus (In The Alternative to a Petition for Writ of Prohibition), filed in Missouri Court of Appeals, Western District

5-17-79 Stop Order directed to the Hon. Donald L. Mason, Judge, Sixteenth Judicial Circuit, Jackson County, Missouri, Division 11, filed.

5-30-79 Relator's Petition for Writ of Mandamus and Alternative Petition for Writ of Prohibition denied, Stop Order entered 5-17-79 dissolved.

6-1-79 Motion for Rehearing or in the Alternative to Transfer to the Supreme Court En Banc filed.

STATE OF MISSOURI
IN THE CIRCUIT COURT
OF ST. LOUIS COUNTY

402723

STATE OF MISSOURI

vs.

ROBERT ERNEST BULLINGTON W/M/36
2821 Gatling
St. Louis, Mo., DEFENDANT

DOB: 8/16/41
Ht. 6'1" Wt. 165 lbs.
St. Louis County P.D.
77-42854

CHARGE: CT. I: CAPITAL MURDER
CT. II: KIDNAPPING
CT. III: ARMED CRIMINAL ACTION
CT. VI: BURG. 1ST DEGREE
CT. V&VI: FLOUR. DANGEROUS & DEADLY WEAPON

AFFIANT: Det. Chasteen

DATE WARRANT ISSUED: October 14, 1977
O&P 559.005
Rev. Mo. Stat. O&P 559.240
O&P 559.225 0-560.040
P-560.095 O&P 564.610
P.D.: St. Louis County

WITNESSES: (HOLD FOR GRAND JURY)

Ptn. Robert Manlon #1352
Det. Albert Chasteen #448
Det. Lester Reinhardt #568
St. Louis County P.D.

Mrs. Mary Jane Wright
John Perry Wright
136 Martigney
St. Louis County

Custodian of Records
Mo. Dept. of Revenue
Jefferson City, Mo.

INDICTMENT—Filed Dec. 9, 1977

STATE OF MISSOURI)
COUNTY OF ST. LOUIS) SS

COUNT I

The Grand Jurors for the State of Missouri, now here in Court, duly empaneled, sworn and charged to inquire within and for the body of the County of St. Louis, and State aforesaid, upon their oath present and charge that in the County of St. Louis and State of Missouri, on or about the 3rd day of September, 1977, the defendant did wilfully, unlawfully and feloniously knowingly, deliberately, premeditatedly and of his malice aforethought, make an assault upon one Pamela Sue Wright, the said ROBERT ERNEST BULLINGTON then and there unlawfully, wilfully, feloniously, knowingly, deliberately, premeditatedly and of his malice aforethought and with the intent to take the life of Pamela Sue Wright, did suffocate the body of Pamela Sue Wright thereby inflicting mortal injury from which Pamela Sue Wright did die on or about September 3, 1977;

COUNT II

The Grand Jurors for the State of Missouri, now here in Court, duly empaneled, sworn and charged to inquire within and for the body of the County of St. Louis, and State aforesaid, upon their oath present and charge that in the County of St. Louis and State of Missouri, on or

about the 3rd day of September, 1977, the defendant did wilfully, unlawfully, and feloniously, and without lawful authority, forcibly seize, confine and kidnap one Pamela Sue Wright with intent to cause said person to be secretly confined within the state against her will;

COUNT III

The Grand Jurors for the State of Missouri, now here in Court, duly empaneled, sworn and charged to inquire within and for the body of the County of St. Louis, and State aforesaid, upon their oath present and charge that in the County of St. Louis and State of Missouri, on or about the 3rd day of September, 1977, the defendant did wilfully, unlawfully and feloniously commit the crime, Kidnapping, a felony, under the laws of this State, with or through the use, assistance or aid of a dangerous and deadly weapon, to-wit: shotgun;

COUNT IV

The Grand Jurors for the State of Missouri, now here in Court, duly empaneled, sworn and charged to inquire within and for the body of the County of St. Louis, and State aforesaid, upon their oath present and charge that in the County of St. Louis and State of Missouri, on or about the 3rd day of September, 1977, the defendant did wilfully, unlawfully and feloniously and burglariously break and enter the dwelling house of Mrs. Mary Wright, hereinafter referred to as the victim, in which dwelling house there was at the time a human being, and that said ROBERT ERNEST BULLINGTON, did break and enter into said dwelling house by forcibly breaking or busing the outer basement door, of the said dwelling house with the intent to commit a felony, to-wit: Kidnapping;

COUNT V

The Grand Jurors for the State of Missouri, now here in Court, duly empaneled, sworn and charged to inquire

within and for the body of the County of St. Louis, and State aforesaid, upon their oath present and charge that in the County of St. Louis and State of Missouri, on or about the 3rd day of September, 1977, the defendant did wilfully, unlawfully and feloniously in the presence of one Mrs. Mary Wright, exhibit and flourish a certain dangerous and deadly weapon, to-wit: shotgun, in a rude, angry or threatening manner;

COUNT VI

The Grand Jurors for the State of Missouri, now here in Court, duly empaneled, sworn and charged to inquire within and for the body of the County of St. Louis, and State aforesaid, upon their oath present and charge that in the County of St. Louis and State of Missouri, on or about the 3rd day of September, 1977, the defendant did wilfully, unlawfully and feloniously, in the presence of one John Wright, exhibit and flourish a certain dangerous and deadly weapon, to-wit: shotgun, in a rude, angry or threatening manner; contrary to Missouri Revised Statutes in such case made and provided, against the peace and dignity, of the State.

A TRUE BILL

/s/ [Illegible]
Foreman

NO TRUE BILL

/s/ _____
Foreman

/s/ [Illegible]
Asst. Pros. Atty.

No. _____

September Term, 1977

Bail—NO BOND

/s/ Milton Saitz
Circuit Judge
St. Louis County

Cir.Ct.No. 402723

SUBSTITUTE INFORMATION IN LIEU OF INDICTMENT

STATE OF MISSOURI)
) ss.
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS STATE OF MISSOURI

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT ERNEST BULLINGTON, DEFENDANT

Charge:

I: Capital Murder (559.005)
II: Kidnapping (559.240)
III: Armed Criminal Action (559.225)
IV: Burglary First Degree (560.040/560.095
V & VI: Flourishing Dangerous & Deadly Weapons (564.610)
And Four Prior Convictions of Felonies

James J. Cook, Assistant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the City of St. Louis, State of Missouri, on the 13th day of January, 1959, in the Circuit Court thereof, was duly convicted by said Court of the offense, Burglary Second Degree and Stealing, a felony, and in compliance with said conviction was duly sentenced to serve two (2) years in custody of the Missouri Department of Corrections for the Burglary and a consecutive term of three (3) years

for the Stealing a total sentence of five (5) years, and in compliance with said conviction and sentence was duly received at and imprisoned in said Department of Corrections on February 13, 1959;

And That, Thereafter, in the City of St. Louis, State of Missouri, on the 13th day of January, 1959, in the Circuit Court thereof, the said defendant was duly convicted by said Court of the offense, Robbery First Degree, a felony, and in compliance with said conviction was duly sentenced to serve five (5) years in custody of the Missouri Department of Corrections, and in compliance with said conviction and sentence was duly received at and imprisoned in said Department of Corrections on February 13, 1959;

And That, Thereafter, in the City of St. Louis, State of Missouri, on the 10th day of November, 1966, in the Circuit Court thereof, the said defendant was duly convicted by said Court of the offense, Stealing Fifty ($50.00) or over (Motor Vehicle), a felony, and in compliance with said conviction was duly sentenced to serve five (5) years in custody of the Missouri Department of Corrections, and in compliance with said conviction and sentence was duly received at and imprisoned in said Department of Corrections on December 9, 1966;

And That, Thereafter, in the City of St. Louis, State of Missouri, on the 17th day of February, 1971, in the Circuit Court thereof, the said defendant was duly convicted by said Court of the offense, Kidnapping While Armed, a felony, and in compliance with said conviction was duly sentenced to serve ten (10) years in custody of the Missouri Department of Corrections, and in compliance with said conviction and sentence was duly received at and imprisoned in said Department of Corrections;

COUNT I

James J. Cook, Assistant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the County of St. Louis, State of Missouri, on or about the 3rd day of September, 1977, did willfuly, unlawfully and feloniously knowingly, deliberately, premeditatedly and of his malice aforethought, make an assault upon one Pamela Sue Wright, the said ROBERT ERNEST BULLINGTON then and there unlawfully, wilfully, feloniously, knowingly, deliberately, premeditatedly and of his malice aforethought and with the intent to take the life of Pamela Sue Wright, did suffocate the body of Pamela Sue Wright thereby inflicting mortal injury from which Pamela Sue Wright did die on or about September 3, 1977;

COUNT II

James J. Cook, Assistant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the County of St. Louis, State of Missouri, on or about the 3rd day of September, 1977, did wilfully, unlawfully and feloniously, and without lawful authority, forcibly seize, confine and kidnap one Pamela Sue Wright with intent to cause said person to be secretly confined within the state against her will;

COUNT III

James J. Cook, Assistant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the County of St. Louis, State of Missouri, on or about the 3rd day of September, 1977, did wilfully, unlawfully and feloniously commit the crime, Kidnapping, a felony under the laws of this State, with or through the use, assistance or aid of a dangerous and deadly weapon, to-wit: shotgun;

COUNT IV

James J. Cook, Assistant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the County of St. Louis, State of Missouri, on or about the 3rd day of September, 1977, did wilfully, unlawfully and feloniously and burglariously break and enter the dwelling house of Mrs. Mary Wright, hereinafter referred to as the victim, in which dwelling house there was at the time a human being, and that said ROBERT ERNEST BULLINGTON, did break and enter into said dwelling house by forcibly breaking or bursting the outer basement door, of the said dwelling house with the intent to commit a felony, to-wit: Kidnapping;

COUNT V

James J. Cook Assistant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the County of St. Louis, State of Missouri, on or about the 3rd day of September, 1977, did wilfully, unlawfully and feloniously in the presence of one Mrs. Mary Wright, exhibit and flourish a certain dangerous and deadly weapon, to-wit: shotgun, in a rude, angry or threatening manner;

COUNT VI

James J. Cook, Asssitant Prosecuting Attorney, in and for the County of St. Louis, on behalf of the State of Missouri, upon official oath informs the Court as follows:

That ROBERT ERNEST BULLINGTON in the County of St. Louis, State of Missouri, on or about the 3rd day of September, 1977, did wilfully, unlawfully and

feloniously, in the presence of one John Wright, exhibit and flourish a certain dangerous and deadly weapon, to-wit: shotgun, in a rude, angry or threatening manner;

cc: Joseph Downey
Asst Public Defender

314-889-2587

[SEAL]

OFFICE OF PROSECUTING ATTORNEY
St. Louis County
Courts Building
Clayton, Missouri 63105

July 7, 1978

COURTNEY GOODMAN JR.
Prosecuting Attorney

Mr. Richard Sindel
Attorney at Law
34 North Brentwood
St. Louis, MO 63105

RE: State of Missouri v.
ROBERT E. BULLINGTON
402723 (CR78-0768)

Dear Mr. Sindel:

Pursuant to R.S. MO. 565.006, please be informed that if a conviction of Capital Murder results from the trial of Mr. Robert Bullington, and the State of Missouri elects to seek the death penalty, the evidence of the following aggravating circumstances will be presented:

> "The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;" 565.012 2.(1)
>
> "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;" 565.012 2(7)

More specifically the State would use as evidence the four prior convictions which are listed in the Substitute

Information in Lieu of Indictment. Also, the State would use as evidence the facts surrounding those convictions; particularly the convictions of Robbery First Degree and Kidnapping. I will provide for you a copy of the Kidnapping police report.

As to the other aggravating circumstances, the State would present to the jury the facts of the case. Of course the discovery process has already provided you with that information.

Very truly yours,

/s/ James J. Cook
JAMES J. COOK
Assistant Prosecuting Attorney

JJC:er
cc: Honorable Donald Mason
cc: Court file

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

Criminal Docket A
Division No. 11
Circuit Court No. 78-0768

STATE OF MISSOURI, PLAINTIFF

—*vs*—

ROBERT H. BULLINGTON, DEFENDANT

MOTION TO QUASH JURY PANEL—
Filed July 8, 1978

Comes now the Defendant, Robert H. Bullington, by Richard H. Sindel, counsel, and moves the Court to quash any jury panel that may be produced as prospective jurors in this cause.

As grounds for this Motion, the Defendant alleges as follows:

1. Section 494.031, V.A.M.S., provides:

> The following persons shall upon their timely application to the court be excused from service as a juror either grand or petit. . . .
>
> (2) Any woman who requests exemption before being sworn as a juror;. . .

Article I, Section 22(b) of the Constitution of Missouri (1945) provides:

> No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror.

The "Official Notice and Questionnaire" prescribed by Section 497.130, V.A.M.S. for distribution to prospective jurors, contains the following paragraph:

TO WOMEN:

The Constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

.....
(Signature)

These provisions, which result in a disproportionately small number of women being available for jury service, deny the defendant his right to have a jury panel selected from a fair cross-section of the community as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

2. Section 497.130, V.A.M.S., also provides as follows:

1. The board of jury supervisors shall at least biannually compile a list of as many names as the board of jury supervisors designates in a written order made for the purpose by consulting any public records . . .

The list in no case shall contain less than twenty-five thousand names to be selected as nearly as may be equally from the several voting precincts in the county . . .

Defendant alleges that the lists of prospective jurors in Jackson County are not made up of names selected by "consulting any public records." Rather, prospective jurors are selected only from lists of registered voters, thereby drastically limiting the number of citizens that are potentially available for jury service. Therefore, jury panels are not selected in accordance with the state law.

WHEREFORE, the Defendant prays the Court to quash any jury panel produced and to declare Section 494.031, V.A.M.S., and Article I, Section 22(b) of the Constitution of Missouri in violation of the rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

/s/ Richard H. Sindel
RICHARD H. SINDEL
Counsel for Defendant
SINDEL, SINDEL & SINDEL
34 N. Brentwood, Ste. 14
Clayton, Missouri 63105
314/721-6040

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

Case No. CR78-0768
Division No. 11
Criminal Docket "A"

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT ERNEST BULLINGTON, DEFENDANT

Ct. 1—Capital Murder
Ct. 2—Kidnapping
Ct. 3—Armed Criminal Action
Ct. 4—Flour. Dang. & Dead. Wpn.
Ct. 5—Flour. Dang. & Dead. Wpn.

MEMORANDUM

COMES NOW the State of Missouri by the Assistant Prosecuting Attorney, James J. Cook, and asks leave of court to amend the above styled cause to change the word "suffocate" in COUNT I to the word "drown".

JAMES J. COOK
Assistant Prosecuting Attorney

EXCERPTS FROM JURY INSTRUCTIONS

INSTRUCTION NO. 10

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that between September 3, 1977 and September 11, 1977, in the County of St. Louis, State of Missouri, the defendant caused the death of Pamela Sue Wright by drowning her, and

Second, that the defendant intended to take the life of Pamela Sue Wright, and

Third, that the defendant knew that he was practically certain to cause the death of Pamela Sue Wright, and

Fourth, that the defendant considered taking the life of Pamela Sue Wright and reflected upon this matter coolly and fully before doing so,

then you will find the defendant guilty under Count I of capital murder.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty under Count I of that offense.

INSTRUCTION NO. 12

As to Count I, if you do not find the defendant guilty of capital murder, then you must consider whether he is guilty of murder in the first degree.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that between September 3, 1977 and September 11, 1977, in the County of St. Louis, State of

Missouri, the defendant caused the death of Pamela Sue Wright by drowning her, and

Second, that the defendant did so to prevent detection after kidnapping or to promote escape after kidnapping Pamela Sue Wright,

then you will find the defendant guilty under Count I of murder in the first degree.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty under Count I of that offense.

Kidnapping is defined as willfully and without lawful authority, forcibly to seize, confine, inveigle, decoy or kidnap any person, with intent to cause such person to be secretly confined against his will.

INSTRUCTION NO. 14

As to Count I, if you do not find the defendant guilty of capital murder or murder in the first degree, you must consider whether he is guilty of murder in the second degree.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that between September 3, 1977 and September 11, 1977, in the County of St. Louis, State of Missouri, the defendant caused the death of Pamela Sue Wright by drowning her, and

Second, that the defendant intended to take the life of Pamela Sue Wright, and

Third, that the defendant did not do so in anger or fear suddenly provoked by the unexpected acts or conduct of Pamela Sue Wright,

then you will find the defendant guilty under Count I of murder in the second degree.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty under Count I of that offense.

INSTRUCTION NO. 16

As to Count I, if you do not find the defendant guilty of capital murder or murder in the first degree or murder in the second degree, you must consider whether he is guilty of manslaughter.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt that between September 3, 1977 and September 11, 1977, in the County of St. Louis, State of Missouri, the defendant caused the death of Pamela Sue Wright by drowning her, then you will find the defendant guilty under Count I of manslaughter.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, then you must find the defendant not guilty under Count I of that offense.

STATE OF MISSOURI)
) SS
COUNTY OF JACKSON)

IN THE CIRCUIT COURT OF THE
COUNTY OF JACKSON
STATE OF MISSOURI

Cause No. CR78-0768
Division No. 11

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT E. BULLINGTON, DEFENDANT

VERDICT—Filed October 11, 1978

As to Count I, we, the jury, find the defendant, Robert E. Bullington, guilty of capital murder, as submitted in Instruction No. 10.

/s/ [Illegible]
Foreman

EXCERPTS FROM JURY INSTRUCTIONS

INSTRUCTION NO. 30

You have found the defendant guilty of capital murder. At this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for that offense.

The punishment prescribed by law for capital murder is either death or imprisonment for life by the Division of Corrections without eligibility for probation or parole until the prisoner has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 32

It is your duty to follow the instructions and the law as the Court gives them to you. However, no statement, question, ruling or remark that I have made or may make during the entire trial is intended to indicate my opinion of what the facts are or what the punishment should be. That will be your responsibility. In performing that duty you alone must decide upon the believability of the witnesses and the weight and value of the evidence.

You will recall that the Court told you at the first stage of this trial that you must not assume as true any fact solely because included in or suggested by a question asked a witness. A question is not evidence, and may be considered only as it supplies meaning to an answer.

INSTRUCTION NO. 33

You will now hear argument by the prosecuting attorney and by counsel for the defendant regarding the punishment to be imposed. Their arguments are intended to

help you in understanding the evidence and applying the law, but they are not evidence.

You will bear in mind that it is your duty to be governed by the evidence as you remember it, the reasonable inferences which you believe should be drawn, and the law as given in instructions of the Court.

After counsel have argued the matter, the Court will give you further and final instructions concerning the law relating to the punishment. It is your duty and yours alone to decide upon the punishment to be imposed upon the defendant and to render such verdict under the law and the evidence.

The state's attorney must open the argument. Counsel for the defendant may then make his argument. No further argument is permitted by either side.

INSTRUCTION NO. 35

In determining the punishment to be assessed under Count I against the defendant for the murder of Pamela Sue Wright, you must first unanimously determine:

1. Whether the defendant has a substantial history of serious assaultive convictions.

2. Whether the murder of Pamela Sue Wright involved depravity of mind and that as a result thereof it was outrageously or wantonly vile or horrible or inhuman.

You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and that it is an aggravating circumstance, you must return a verdict fix-

ing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 36

If you find and believe from the evidence beyond a reasonable doubt that one or more of the circumstances submitted in Instruction No. 35 exists and that at least one of them is an aggravating circumstance, it will then become your duty to decide whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as punishment of defendant. In deciding that question you may consider all of the evidence relating to the murder of Pamela Sue Wright.

You may also consider any of the aggravating circumstances referred to in Instruction No. 35 which you found beyond a reasonable doubt.

If you do not unanimously find from the evidence beyond a reasonable doubt that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 37

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 36, it will then become your duty to determine whether a sufficient miti-

gating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Pamela Sue Wright.

You may also consider:

1. Whether the defendant has no significant history of prior criminal activity.

2. Whether the murder of Pamela Sue Wright was committed while the defendant was under the influence of extreme mental or emotional disturbance.

You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 38

Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance or circumstances found to exist, you are not compelled fix death as the punishment. Whether that is to be your final decision rests with you.

INSTRUCTION NO. 39

You will be provided with forms of verdict for your convenience. You cannot return any verdict as the ver-

dict of the jury unless all twelve jurors concur in and agree to it, but it should be signed by your foreman alone.

If you decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Pamela Sue Wright, your foreman must write into your verdict all of the aggravating circumstances submitted in Instruction No. 35 which you found beyond a reasonable doubt.

If, after considering all of the evidence and instructions of law, you decide that the defendant must be punished for the murder of Pamela Sue Wright by imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence, your foreman will sign the verdict form so fixing the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the court.

If, after due deliberation, you are unable to agree upon the punishment, your foreman will sign the verdict form so stating. In such case, the court will fix the defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.

VERDICT FORM—Filed October 12, 1978

As to Count I, we, the jury, having found the defendant guilty of the capital murder of Pamela Sue Wright, fix the punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until the defendant has served a minimum of fifty years of his sentence.

/s/ [Illegible]
Foreman

IN THE CIRCUIT COURT OF THE
COUNTY OF JACKSON
STATE OF MISSOURI

Cause No.
Division No. 11

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT E. BULLINGTON, DEFENDANT

MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL

Filed November 20, 1978

COMES NOW the defendant, Robert E. Bullington, by and through his attorney, and moves the Court for a judgment of acquittal, or in the alternative for a new trial on the grounds that:

1. The Court erred in allowing venireman #9 Esto Jackson, #29 Richard W. Livingstone, #6 David Campbell, #18 Rebecca A. Borelli, #41 Edward F. Thompson, #59 Vincent R. Como, and other from the panel, to be stricken for cause by the prosecutor, said veniremen having given no indication that he could not follow the law the Court would give in the instructions. Said Veniremen were stricken only because they indicated they could not or would be very reluctant to impose the death penalty in subject cause. The allowance of these strikes for cause denied defendant his right to the presence on the panel of legally qualified veniremen, deprived him of his right to an impartial jury panel, deprived him of his rights to due process and equal projection of the law and a jury of his peers guaranteed under the V, VI and XIV Amendments to the U.S. Constitution and therefore denied him his right to a fair trial.

2. The Court erred in allowing the prosecuting attorney to propound questions to the veniremen about their relative abilities to impose the death penalty in subject cause for the reason that at the time of asking said questions the Prosecuting Attorney of St. Louis County knew that he would not actively seek or recommend to the jury that the death penalty be imposed and was rising said inquiry to deplete the panel and to strike those veniremen who would strongly indicate an adversion to the imposition of the death penalty. Said strikes unjustly deprived the defendant of his right to an impartial panel of legally qualified veniremen representing a true cross-section of the community and a jury of his peers. The allowance of said question and the subsequent improper strikes discussed in Point F, deprived defendant of his right to an impartial jury panel, his rights to due process and equal protection of the law, his rights to a jury of his peers, his rights as guaranteed to him by the V, VI and XIV Amendments to the U.S. Constitution, and, therefore, his right to a fair trial.

3. The trial Court erred in denying the defendant's pre-trial motion to dismiss Count I of the indictment for the reasons as set out more specifically in said Motion to Dismiss and for the reasons that Sections, 565.001, 565.003, 565.006, 565.008, and 565.016 RSMo. 1977 are unconstitutional in that they violate the Eighth and Fourteenth Amendments of the U.S. Constitution and Article IV, Section 21 of the Constitution of the State of Missouri.

4. The trial court erred in denying the defendant's pre-trial motion to sever counts because under 559.005, 559.240, 559.225, 560.040/560.095 and 564.610 V.A.M.S. the offenses alleged could not have been joined and Missouri Supreme Court Rule 24.04, which purports to allow joinder in the same indictment of offenses based on the same act or transactions or which constitutes part of a common scheme or plan, effects a change in the substenitive rights of the defendant by Supreme Court Rule,

an unconstitutional encroachment by the Judiciary Bench into the domain of the Legislative Branch under Article II, Section I of the Missouri Constitution.

5. The trial Court erred in denying the defendants pre-trial motion to sever counts because said refusal forced the jury into a situation wherein they could consider punishment of defendant on only one of six counts and allowed them unnecessary freedom to speculate as to why they were not allowed to assess punishment on Counts II-VI and would therefore deprive defendant of his right to a fair and impartial trial.

6. The trial court erred in denying the defendants pre-trial motion to sever Counts for the reason that there was no evidence supporting any argument that Count I was part of a common scheme or plan or that the offense charged in Count I was based on the same act or transaction as charged in the other Counts.

7. The trial court erred in denying the defendant's pre-trial motion to dismiss Count III of the Substitute Information In Lieu of Indictment for the reason that the charging of said offense, armed criminal action, in conjunction with the charges set out in Counts V and VI of the Substitute Information In Lieu of Indictment is specifically prohibited under Section 559.225 (4) V.A.M.S.

8. The trial court erred in denying the defendant's pre-trial motion to dismiss Count III of the Substitute Information in Lieu of Indictment because charging the defendant under both Count III and Counts V and VI amounts to placing the defendant twice in jeopardy in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 19 of the Missouri Constitution.

9. The trial court erred in denying the defendant's pre-trial motion to dismiss Count III of the Substitute Information in Lieu of Indictment, because Section 559.225 (1) V.A.M.S. provides for sentences specifically excluding parole, probation, conditioned release, or sus-

pended imposition or execution of sentence for a period of three years, which is an unconstitutional encroachment upon both the Executive and Judicial Branches of the State Government by the Legislative Branch under Article II, Section 1 of the Missouri Constitution.

10. The trial court erred by refusing to allow defense counsel to individually voir dire the members of the jury panel, as to hobbies or special interests, memberships in various organizations, publications they may subscribe to or read on a regular basis, newspapers they read or subscribe to on a regular basis, religious affiliation and the court further erred by admonishing defense counsel not to ask such questions in that:

A. The trial court's admonition reflected to the panel of veniremen a position of advocacy rather than objectivity.

B. Said questions were not objected to by the prosecuting attorney and no grounds were given for the Court's refusal to allow said questions.

C. By not affording defense counsel the opportunity to ask said questions the Court seriously hampered the defendant in making challenges for cause and intelligent and knowing peremptory challenges.

11. The trial court erred in denying the defendant's motion to suppress the in-court identification of defendant by Mary Wright and John Wright because such identification was fatally infected by the inherently suggestive out-of-court identification, conducive to mistake in that:

A. Before viewing the line-up Mary Wright and John Wright had seen the defendant's photograph on several occasions and on each occasion the viewing of the photograph directly related to the subject case and their identification.

B. Immediately before viewing the line-up Mary Wright and John Wright viewed the defendant on a local television news cast wherein it was indicated that the

defendant had that day been returned from California and that prior to viewing said line-up Mary Wright and John Wright were informed by Detective Chasteen and Seymour that a suspect had been brought in from California and would be in the line-up they were to view;

C. At the lineup which each of them observed defendant was the only one looking to be in his late 30's and the others appeared considerably younger or considerably older;

D. John Wright and Mary Wright were shown a photograph of the defendant the night before they were to testify in court by the Prosecuting attorney and they had since the line-up and prior to the trial seen numerous photographs of the defendant on newscasts and in the newspaper which by their coverage directly linked defendant to the crimes herein charged;

E. Both Mary Wright and John Wright testified they only saw the perpetrator for a period of 10-15 seconds and that his face was covered with make-up;

All in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; and Article I, Sections 10, 15, and 18(a) of the Missouri Constitution.

12. The trial court erred in that the bailiffs and individuals who were responsible for the control summoning and accompaniment of the sequestered jury at all time when they were not in the court and present before the defendant, were not administered and did not take or swear to the oath in violation of Section 494.070 V.A.M.S.

13. The trial court erred in overruling the defendant's motion to suppress evidence and in allowing items seized from the residence and automobile of the defendant to be introduced against him, said items being seized as the result of an unlawful search, in violation of defendant's rights under Article I, Sections 10, 15 and 18(a) of the Misouri Constitution, and the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

14. The trial court erred for not dismissiong Count I of the Substitute Information in Lieu of Indictment for the reason that said statute constitutes an ex-post-facto law in that its validity depends on a future event (565.016 V.A.M.S.) in violation of the Constitution of the United States and the Constitution of the State of Missouri.

15. The trial court erred in not submitting to the jury M.A.I.-Cr2.50, the character instruction, for the reason that there was evidence of defendant's good character and said omission by the Court was in violation of Missouri Supreme Court Rule 26.02 (6).

16. The Court erred in admitting evidence of Defendant's flight from St. Louis, Missouri and the Killark Electrical Co. to Guyman, Oklahoma, and California in that at said time there was an active warrant pending for the arrest of the defendant on the charge of child molestation and, therefore;

Said flight could have resulted from the active warrant for defendant's arrest. Said testimony should not have been admitted into evidence because:

A. The defendant could not rebut the presumption that said flight resulted from a fear of being apprehended for subject cause as that would be evidence of other crimes.

B. It is ambiguous and mere speculation to presume or assume that the reason defendant fled was because of subject charge and not the active warrant for his arrest.

C. The admission of said evidence allowed the jury to speculate as to the reason for defendant's flight from St. Louis.

D. Said evidence was irrelevant, immaterial and because of its inherent ambiguity of a highly prejudicial nature while being of little probative value.

17. The trial court erred by telling the jury panel during the voir dire examination that they would sen-

tence the defendant for the reason that said comment was an improper statement of the law in that defendant was charged under the Habitual Criminal Act and the jury was not allowed to sentence the defendant on counts II-VI. This comment allowed and forced the jury to speculate as to why they were not allowed to sentence the defendant on Counts II-VI and in essence informed the jury that defendant had been convicted of other crimes.

18. The trial court erred by informing the jury panel that defendant's bond was set at $150,000 in that such a comment implied that defendant was a dangerous individual and a bond as high as that was required to insure his incarceration during the pendency of subject cause and allowed the jury panel to speculate as to the quality and quantity of the evidence before the Court which set the bond inferring that said evidence must be substantial and therefore required such a high bond causing the jury panel to be prejudiced against the Defendant and denying his right to a fair and impartial trial before an impartial jury.

19. The trial court erred in allowing the State to introduce into evidence State's Exhibit #91, a model 1200 Winchester Rifle, over defendant's objection for the reason that John Wright and Mary Wright could only testify that said exhibit was similar to the gun used by the suspect, there was no proper foundation laid for the admission of said Exhibit into evidence, and said admission was highly prejudicial to defendant in that Bernard Gonek later testifies that said Exhibit was identical to the weapon purchased by the defendant from Mr. Gronek.

20. The trial court erred in allowing Mary Wright to testify in direct examination that she had viewed other line-ups and photographic line-ups in which defendant or his photograph was not included for the reason that said testimony was irrelevant, immaterial and was an attempt by the prosecuting attorney to rehabilitate witnesses who had not been impeached.

21. The trial court erred in allowing John Wright to testify in direct examination that he had viewed other line-ups and photographic line-ups in which defendant or his photograph was not included for the reason that said testimony was irrelevant, immaterial and was an attempt by the prosecuting attorney to rehabilitate witnesses who had not been impeached.

22. The trial court erred in admitting into evidence over defendant's objections testimony from Mary Wright that when she heard the defendant speak at the line-up her knees buckled and she almost fainted for the reason that said testimony was irrelevant, immaterial and self-serving.

23. The trial court erred in admitting into evidence over defendant's objection testimony from Al Chasteen that Mary Wright fainted during the line-up defendant was in for the reason that said testimony was inadmissible as hearsay conduct and denied the defendant his right to confront and cross-examine witnesses guaranteed him under the United States Constitution.

24. The court erred in admitting into evidence over defendant's objection State's Exhibits 30, 31, 32, 33, 34, 35, 110, 111, and 112, 105, 108 and 116 which were picture's of the deceased's body at the scene of recovery and the morgue for the following reasons:

A. There was not a sufficient foundation laid for their admission in that there were not properly identified as to what they purported to represent, nor was there any testimony that they fairly and accurately depicted anything that existed at or near the time of the alleged killing. For this reason the pictures were irrelevant and immaterial and yet highly prejudicial to defendant, since clearly it was the intent of the prosecutor to allow the jury to speculate that they represented conditions at the time of the killing.

B. There was not a sufficient foundation laid for their admission in that they did not fairly and accurately reflect the recovery scene of the body in that the body had

been moved prior to the photographs having been taken. For this reason those photographs were irrelevant and immaterial and yet highly prejudicial to the defendant, since clearly the intent of the prosecutor was to allow the jury to speculate that they represented conditions at the time the body was first discovered.

C. The pictures were of such a gory and gruesome nature that they tended to inflame the passions of the jurors and therefore any probative value they had was far outweighed by their prejudicial effects toward defendant.

25. The trial court erred in admitting over defendant's objections testimony from Connie Matzek relating to certain statements allegedly made by the defendant to her for the reasons that:

A. At the time of said statements there was an active warrant pending charging the defendant with child molestation.

B. Said child molestation warrant charged defendant with having molested his own daughter.

C. Said statements were inherently ambiguous as to the subject matter they referred to and could have referred to the charge of child molestation.

D. That to explain said statements it would be necessary to introduce evidence of other crimes.

E. That the defendant specifically requested Al Chasteen to place him in isolation at the St. Louis County Jail Facility for other reasons that he feared for his life as a result of the publicity and nature of the child molestation charge.

F. That defendant was arrested in California and extradited from California for the charge of child molestation.

G. That said testimony was irrelevant, and immaterial and constituted hearsay and the only purpose of introducing same must have been to influence the jury to believe that the defendant's statement could only refer

to the crimes charged, but such belief would have had to be based on speculation and guesswork.

H. That said testimony was highly prejudicial to defendant but because of its ambiguous nature had no real probative value.

26. The court erred in overruling defendant's motion for judgment of acquittal on all six counts at the close of the state's case, because there was insufficient evidence to sustain a verdict of guilty.

27. The Court erred in overruling defendant's motion for judgment of acquittal on all six counts at the close of all the evidence because there was insufficient evidence to sustain a verdict of guilty.

28. The court erred in submitting Instruct #10 the state's verdict director on the charge of Capital Murder for the reasons that there was no evidence to support the giving of said instruction.

29. The Court erred in submitting Instruction #12, the state's verdict director on the charge of Murder First Degree for the reasons that there was no evidence to support the giving of said instruction.

30. The Court erred in submitting Instruction #14 the state's verdict director on the charge of Murder Second Degree for the reasons that there was no evidence to support the giving of said instruction.

31. The Court erred in submitting Instruction #16 the state's verdict director on the charge of Manslaughter for the reasons that there was no evidence to support the giving of said instruction.

32. The trial court erred by allowing the jury to take all the exhibits to the jury room for deliberations except States Exhibit #91 before they requested to do so for the reason that the jury does not have an absolute right to take said exhibits to the jury room and it would allow the jury the opportunity to conduct their own experiments and tests with the various exhibits all of which would lead the jury to guesswork and speculation as to matters outside the scope of the evidence. The defendant

was further prejudiced by such action in that he did not have an opportunity to review the juror's requests as the items were sought and to advise the court of his individual objections to the jury taking said exhibits for use in their deliveration.

33. The trial court erred in not sustaining comments from the prosecuting attorney during voir dire and during the course of the trial that he had reviewed the evidence and after having done so he ordered a warrant be issued for the reason that said statement would necessarily be leading to believe that there must exist some evidence known to the prosecuting attorney that definitely links the defendant to the crime charged and would allow the jury to speculate as prosecuting attorney's personal opinion as to the relative merit of the case, and the province of jury to be the decider of the facts was invaded through an impermissible inference of defendant's guilt.

34. The Court erred in admitting into evidence State's Exhibits 160, 171, 172, 164, 162, 173 and 174, hair samples taken from various individuals for the reason that the state laid no proper foundation to show an appropriate chain of custody.

35. The court erred in admitting into evidence over defendant's objections testimony from Joseph Bono that the hairs referred to in Point 34 did not match a hair seized from defendant's car for the following reasons:

A. The State did not lay a proper foundation to show an appropriate chain of custody for said hair.

B. There was no showing that said hair had not been tampered with.

C. The State did not establish that said hair was taken in such a manner to insure a proper sampling of the individual's hair. That said omissions rendered the experiments conducted on the hairs as mere speculation and guesswork and further that those hair samples taken were not done so in accordance with the best established procedure for obtaining samples for comparative

testing purposes. The admission of such comparison results could only lead the jury to speculate that the hair found and seized from the suspect's automobile belonged to the victim.

36. The trial court erred not allowing the defendant to speak to the jury for purposes of comparing his voice to the voice of Al Chasteen for the reason that there had been repeated testimony from Mary Jane Wright and John Wright concerning the comparison of the defendant's voice with that of Chasteen's and Mary Jane Wright had in fact identified the defendant by his voice alone. Said testimony would have been material and relevant and was offered for demonstrative purposes only. The court by refusing the defendant the opportunity for such a comparison unduly restricted the defendant from showing to the jury the distinct and substantial differences in the timbre and tone of his voice as compared to witness Chasteen's voice.

37. The jury's verdict was atainst the weight of the evidence.

38. The trial court erred in not instructing the jury on assault with intent to kill with malice, assault with intent to kill without malice, assault with intent to do Great Bodily Harm, and common assault as to the Count I thus for the reasons that said instructions were supported by the evidence and said refusal inalterably tainted the jury's verdict as to Count I because they were not properly instructed as to all of the possibilities in regard to a verdict of assault.

39. The trial court erred in submitting to the jury instruction no. 12 which constituted the court's explanation of the crime of felony-murder in the first degree on the grounds that such instruction incorrectly interpreted the laws of the State of Missouri as related to the facts of this specific case. The instruction hypothesized that the jury should find the defendant guilty if the defendant caused the death of Pamela Sue Wright in an effort to promote escape or to prevent detection after kidnapping Pamela Sue Wright. Such instruction was erroneous.

Specifically, there was no evidence that the drowning of Pamela Sue Wright occurred in an attempt by defendant to promote escape or to prevent detection and consequently Instruction No. 12 did not relate to the facts of this specific case.

40. The trial court erred in submitting Instruction No. 20 to the jury in that it was impermissibly vague and invited the jury to convict the defendant based on speculation and conjecture rather than legal principle. The instruction indicated that the jurors should convict the defendant if they found that he had committed the offense by the use of a dangerous and deadly weapon and did not explain to the jury what was meant by the phrase "by use of".

41. The Court erred in submitting Instruction #10, 12, 14, and 16, the state's verdict directions on Count I, for the following reasons:

a. There was no evidence to support the giving of said instruction.

b. The instructions varied from what the defendant was charged with in the substitute information in lieu of indictment, in that the defendant was charged with having caused the death of Pamela Sue Wright on September 3, 1977, whereas the instruction allowed the jury to find him guilty if they believed he caused the death of Pamela Sue Wright at any time between 9/3/77 and 9/11/77. Said variance denied defendant his right to due process of law by lessening the proof required for conviction without giving him the opportunity to defend against the lesser requirement. Said instruction further violated his rights to due process under the Fourteenth Amendment of the U.S. Constitution to notice of charges against him.

42. The trial court erred in allowing Angela Lotz to testify over defendant's objections concerning an incident involving a dark-haired man stopping and looking at Ms. Lotz and her friend, Terry Moore. Ms. Lotz was allowed to testify over defendant's objection that Ms.

Moore at one time lived in Pamela Sue Wright's house on 136 Martigney. Said statements were irrelevant and immaterial in that the prosecutor never linked the dark-haired man with the defendant nor was he ever able to establish with any evidence that the defendant knew or could have known where Ms. Lotz or Ms. Moore used to live on Martigney Drive. The only purpose of introducing said evidence must have been to influence the jury to believe that defendant must have been the dark-haired man and must have been searching for Angela Lotz on Martigney, but such belief would have had to be based on speculation and guesswork to defendant's prejudice.

44. The trial court erred in admitting into evidence over defendant's objection, state's Exhibit #143 a check purportedly signed by the defendant for the purchase of a shotgun and State's Exhibit #166 for the following reasons:

a. These exhibits were irrelevant and immaterial there being no showing sufficient to connect said exhibits to the defendant.

b. Their admission could only have been for the purpose of allowing the jury to speculate that there were in fact used, signed or in anyway connected with the defendant.

c. There was not a sufficient foundation laid for their admission.

d. Their admission and the court's subsequent release of these items to the jury allowed them to conduct their own experiments and comparisons of the signatures to determine authenticity whereas such conclusions are clearly only the subject of the admissible or carefully secreting by a highly trained expert.

45. The trial court erred by modifying MA1-CR2.70 and submitting it as Instruction #9 for the following reasons.

a. The modification of said instruction is not in accordance with any modification or alteration approved by the Supreme Court of Missouri.

b. The modification of said Instruction significantly altered the meaning and construction of said Instruction when read alone or in conjunction with the court's other instruction.

c. Said instruction as modified is not a proper statement of the law.

d. That the jury could interpret Instruction #9 to be a mandate to the jury that the defendant must be found guilty as to Instruction #20.

e. That said instruction is confusing and misleading as to how to apply Instruction #9 to the other verdict-director instructions.

f. That the instruction is a misstatement of the law in its face in that it directs the jury that they cannot find the defendant guilty or not guilty in Instruction #20, the verdict director for Armed Criminal Action;

All to the detriment and prejudice of the defendant.

45. The Court erred in submitting Instructions #10, 12, 14, 16, 18, 20, 22, 24, and 26, the verdict directors for the following reasons"

a. Not a proper statement of the law.

b. They were modified as to their form in a manner not suggested or approved by the Supreme Court of the State of Missouri.

c. Said modification was misleading as to each individual instruction and the instructions taken together as a whole in that a juror would, after reading said instruction, tend to believe that you could find the defendant guilty only, not guilty, or guilty of all the charges.

d. Said instructions were misleading in that they would tend to indicate to the jury if he were not guilty under the instruction he must then be guilty of another crime, charged or not.

e. That said instructions as modified tended to mislead and confuse the jury all to the detriment and prejudice of the defendant.

46. Prior to trial, the court erred in overruling defendant's motion to quash the jury panel insofar as the Jackson County procedure for the selection of petit jurors violates defendant's rights to a jury drawn from a reasonably representative cross section of society in violation of the Sixth and Fourteenth amendments to the United States Constitution. Said procedure in Jackson County allows women an automatic exemption which results in disproportionate underrepresentation of women on the jury panel: such a system is in violation of *Taylor* vs. *Louisiana*, 419 U.S. 522 (1975).

WHEREFORE, the defendant respectfully requests this Court to enter judgment of acquittal, or in the alternative to grant defendant a new trial.

Respectfully submitted,

/s/ Richard H. Sindel
RICHARD H. SINDEL
Attorney-at-Law
34 North Brentwood Blvd.
Suite 14
Clayton, Missouri 63105
(314) 721-6040

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI

No. CR78-0768
Docket L
Division 11

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT E. BULLINGTON, DEFENDANT

Ct. 1—Capital Murder
Ct. 2—Kidnapping
Ct. 3—Armed Criminal Action
Ct. 4—Burglary I
Ct. 5—Flourishing Dangerous & Deadly Weapon
Ct. 6—Flourishing Dangerous & Deadly Weapon

ORDER

APPEARANCES

1. State by Ass't. Pros. Atty. James Cook
2. Defendant in Person and by Atty. Richard Sindel

The ruling of the Supreme Court of the United States in *Duren* v. *State of Missouri*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, and its progeny, being dispositive makes it unnecessary to rule on the more crucial and meritorious issues of whether the State made a submissible case of any degree of homicide, and the other issues raised in defendant's after-trial motions,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that defendant's Motion for Judgment of Acquittal be overruled and defendant's Motion for a New Trial be sustained on the grounds stated in paragraph 46 of the new trial motion.

IT IS FURTHER ORDERED that the cause is transferred to Criminal Docket "A" for reassignment.

February 13, 1979
Date

/s/ [Illegible]
Judge

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI

No. CR78-0768
Division 11

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT E. BULLINGTON, DEFENDANT

Ct. 1—Capital Murder
Ct. 2—Kidnapping
Ct. 3—Armed Criminal Action
Ct. 4—Burglary I
Ct. 5—Flourishing Dangerous & Deadly Weapon
Ct. 6—Flourishing Dangerous & Deadly Weapon

NOTICE OF EVIDENCE IN AGGRAVATION

Pursuant to Section 565.006 (2) V.A.M.S., the State, by the below signed Assistant Prosecuting Attorney, hereby makes notice of its intention to seek the death penalty in the above styled cause and to present to the jury in any hearing upon the issue of punishment evidence of the following aggravating circumstances:

1. The offense was committed by a person who has a substantial history of serious assaultive criminal convictions.

2. The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind.

The State incorporates by reference all previously endorsed witnesses and reports presented to defense counsel in this cause. The testimony of these witnesses concerning the circumstances of the murder herein and the evi-

dence of prior convictions previously disclosed to defense counsel will be offered to prove the aggravating circumstances set out above.

Respectfully submitted,

/s/ James J. Cook
JAMES J. COOK
Assistant Prosecuting Attorney
7900 Carondelet
Clayton, Missouri 63105
314-889-2600

Certificate of Service (omitted in printing)

STATE OF MISSOURI)
) ss
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT
OF THE COUNTY OF JACKSON, MISSOURI

Cause #CR78-0768
Division #11

STATE OF MISSOURI, PLAINTIFF

vs.

ROBERT E. BULLINGTON, DEFENDANT

MOTION TO STRIKE PLAINTIFF'S NOTICE OF EVIDENCE IN AGGRAVATION AND TO EXCLUDE FROM TRIAL EVIDENCE IN AGGRAVATION OF PUNISHMENT

COMES NOW defendant and for his motion states:

1. That on or about October 12, 1978 defendant was found guilty by a jury of a capital murder pursuant to Section 565.001 V.A.M.S.

2. That following the return of the guilty verdict by the jury, a hearing was conducted pursuant to Section 565.006 (2) V.A.M.S., to determine whether the required aggravating circumstances existed and whether the death penalty should be imposed pursuant to Section 565.008 V.A.M.S.

3. That after evidence was heard, the cause was submitted to the jury and they found that defendant, under the evidence, should be sentenced to life imprisonment, and that the requisite "aggravating circumstances" had not been proven beyond a reasonable doubt.

4. That on or about January 2, 1979, defendant filed a Motion For New Trial, which was granted on or about February 13, 1979, in light of *Duren* v. *Missouri*, No. 77-6067 (January 9, 1979).

5. That the plaintiff's Notice of Evidence in Aggravation, if not stricken, places defendant twice in Jeopardy in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 19 of the Constitution of Missouri for the reasons that the determination of punishment has been made, and was not affected by the trial courts granting defendant's Motion For New Trial; that said determination of punishment constitutes a conviction of the offense of capital murder punishable by life imprisonment which is a lesser included offense of capital murder punishable by death; and that conviction of the offense of capital murder punishable by life imprisonment constitutes an acquittal of the offense of capital murder punishable by death.

6. That the plaintiff's Notice of Evidence in Aggravation and any presentment of said evidence is subject to the Doctrine of Collateral Estoppel in that the issue of punishment and aggravating circumstances considered in imposing said punishment has been previously litigated and imposed and remains undisturbed by the trial court's granting defendant's Motion For New Trial. Any admission of said evidence would lie in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 19 of the Constitution of Missouri.

7. Defendant further states that the plaintiff's Notice of Evidence in Aggravation if permitted to stand and the presentment of said evidence at defendant's new trial would: Have a chilling effect on defendant's right to appeal in that a determination of punishment has been made; subject defendant to relitigation of this identical issue and therefore effectively hamper and chill his rights to seek that relief guaranteed him by law; deny defendant his right to effective assistance of counsel; deny defendant due process of law and equal protection of the law; subject defendant to cruel and unusual punishment, all in violation of the Fifth, Sixth, Eighth and Four-

teenth Amendments to the Constitution of the United States and Article 1, Sections 10, 18(a), 19, and 21 of the Constitution of Missouri.

8. The Prosecutor has not advised defendant or the Court by said Notice of Evidence in Aggravation of any evidence or grounds not available or presented at the first trial.

WHEREFORE, defendant prays that plaintiff's Notice of Evidence in Aggravation be stricken, and that all evidence in aggravation of punishment be excluded from trial.

Respectfully submitted,

/s/ Richard H. Sindel
RICHARD H. SINDEL
Attorney for Defendant
Sindel, Sindel & Sindel
34 N. Brentwood, Suite 14
Clayton, Missouri 63105
314/721-6040

Certificate of Service (omitted in printing)

IN THE CIRCUIT COURT
OF THE COUNTY OF JACKSON
STATE OF MISSOURI

No. ———

STATE OF MISSOURI, EX REL,
GEORGE R. WESTFALL, RELATOR

vs.

THE HONORABLE DONALD L. MASON,
Judge, Sixteenth Judicial Circuit
Jackson County, Missouri

DIVISION 11, RESPONDENT

PETITION FOR WRIT OF MANDAMUS

(In The Alternative To A Petition For
Writ of Prohibition)

COUNT I

(In Alternative To Count II)

Relator respectfully states:

1. George R. Westfall is the duly elected, qualified and acting Prosecuting Attorney for the County of St. Louis, State of Missouri.

2. Respondent herein is a Judge of the Sixteenth Judicial Circuit, Jackson County, Missouri, Division 11.

3. On the 9th day of December, 1977, an indictment was filed in the Circuit Court of St. Louis County charging the defendant Robert Bullington with Count I—Capital Murder, Count II—Kidnapping, Count III—Armed Criminal Action, Count IV—Burglary First Degree, Count V—Flourishing A Dangerous And Deadly Weapon and Count VI—Flourishing A Dangerous And Deadly Weapon.

4. On the 2nd day of May, 1978, a change of venue was granted and the case was transferred to the Sixteenth Judicial Circuit, Jackson County, Missouri.

5. On the 7th day of July, 1978, the State filed a Notice of Evidence in Aggravation, thereby indicating to the Court and the Defendant the State's intention to seek the death penalty if a conviction of Capital Murder resulted.

6. On the 2nd day of October, 1978, the trial in the case of State of Missouri v. Robert Bullington was convened in Division 11 of the Circuit Court of Jackson County and resulted in a verdict of guilty on all counts on the 11th day of October, 1978.

7. On the 12th day of October, 1978, the trial was held to consider punishment following the verdict of guilty of Capital Murder, and resulted in a finding by the jury that the defendant be sentenced to serve a term of imprisonment of life without probation or parole for at least 50 years.

8. On the 20th day of November, 1978, a motion for new trial was filed by the defendant.

9. On the 13th day of February, 1979, the Honorable Judge Donald L. Mason sustained the motion for new trial on the basis of the decision of the U.S. Supreme Court in the case of *State* v. *Duren*, U.S. Supreme Court No. 77-6067 (January 9, 1979).

10. Thereafter, the State filed a Notice of Evidence in Aggravation, thereby indicating to the Court and the defendant the State's intention to seek the death penalty upon the retrial of the case. (See attached Exhibit No. ——)

11. On the 12th day of March, 1979, the defendant filed a Motion to Strike Plaintiff's Notice of Evidence in Aggravation and to Exclude From Trial Evidence in Aggravation of Punishment. (See attached Exhibit No. ——)

12. On the 26th day of March, 1979, the parties appeared before the Honorable Donald L. Mason and argued defendant's motion to strike along with other motions.

13. On May 10, 1979 the Honorable Donald L. Mason announced his intention to enter an order on May 15, 1979 sustaining defendant's Motion to Strike the State's Notice of Evidence in Aggravation of Punishment, "to the extent that the State will not be permitted to seek the death penalty, should the defendant again be found guilty of Capital Murder." (See attached Exhibit No. ——)

14. On the 11th day of May, 1979, the Honorable Judge Donald L. Mason allowed the parties until May 18, 1979 to seek any extraordinary relief before he formally entered his ruling on the motion.

15. The order of Respondent denying the State the right to seek the death penalty in this case is an abuse of his discretion and would be beyond his jurisdiction in that:

A. Sections 565.001 and 565.008, R.S.Mo., as enacted in 1977 provides that the death penalty is one of the penalties available upon a conviction of Capital Murder.

B. According to previous case law, the possibility of a more severe sentence on retrial is no violation of defendant's protection against double jeopardy, does not offend the due process clause of the Fourteenth Amendment to the United States Constitution, does not place an impermissible chilling effect on the defendant's right to appeal or violate any other rights of the defendant.

16. Relator has no adequate remedy other than an extraordinary writ for the reason that there is no appeal or other remedy for the State to pursue under the Statutes of Missouri when a trial judge prohibits the State from seeking punishment which it is allowed by the statutes.

17. Relator states that time is of the essence in this matter and unless there is a prompt determination the trial will commence on June 4, 1979, with the State being unable to seek punishment allowed by the statutes.

WHEREFORE, Relator prays that this Honorable Court issue its Alternative Writ of Mandamum directed

to Respondent, a Judge of the Sixteenth Circuit, Division 11, Jackson County, Missouri, ordering him to permit the State of Missouri through the Relator, to ask for and seek the death penalty if there is a verdict of guilty of the charge of Capital Murder in the case of State of Missouri vs. Robert Bullington (Case No. CR78-0768), or, that Respondent appear to show cause, if he has any reason why he should not do so; that upon full final hearing this Court make said Writ peremptory, and for such other and further orders as shall seem just and proper.

COUNT II

PETITION FOR WRIT OF PROHIBITION

(In Alternative to Count I)

1. Relator recalls and incorporates by reference paragraphs 1-17 (including any attached Exhibits) of Count I of this petition.

2. The order which Respondent has indicated he will make concerning defendant's Motion to Strike Plaintiff's Notice of evidence in Aggravation and to Exclude From Trial Evidence in Aggravation of Punishment is an abuse of his discretion in that:

A. Sections 565.001 and 565.008, R.S.Mo., as enacted in 1977 provides that the death penalty is one of the penalties available upon a conviction of Capital Murder.

B. According to previous case law, the possibility of a more severe sentence on retrial is no violation of defendant's protection against double jeopardy, does not offend the due process clause of the Fourteenth Amendment to the United States Constitution, does not place an impermissible chilling effect on the defendant's right to appeal or violate any other rights of the defendant.

WHEREFORE, Relator prays this Honorable Court to issue its preliminary rule in prohibition directed to the Respondent, as the Judge of Division Eleven of the Six-

teenth Judicial Circuit, Jackson County, Missouri, prohibiting him from sustaining defendant's Motion to Strike Plaintiff's Notice of Evidence in Aggravation and to Exclude From Trial Evidence in Aggravation of Punishment, or that Respondent appear to show cause, if he has any, why he should not do so; that upon full final hearing this Court make said writ absolute; and for such other or further orders shall seem just and proper.

Respectfully submitted,

/s/ George R. Westfall
GEORGE R. WESTFALL
Prosecuting Attorney
St. Louis County, Missouri

By /s/ James J. Cook
JAMES J. COOK
Assistant Prosecuting Attorney

By /s/ John M. Walsh
JOHN M. WALSH
Assistant Prosecuting Attorney

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

George R. Westfall, being duly sworn upon his oath, states that he is the Prosecuting Attorney for St. Louis County, Relator herein, and the facts stated in the foregoing Petition are true to the best of his information, knowledge and belief.

/s/ George R. Westfall
GEORGE R. WESTFALL
Prosecuting Attorney

Subscribed and sworn to and before me, a Notary Public, in and for the County of St. Louis, State of Missouri, this 16th day of May, 1979.

/s/ Alice E. Griner
Notary Public

My Commission Expires: June 15, 1979

Certificate of Service (omitted in printing)

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 30944

STATE OF MISSOURI, EX REL,
GEORGE R. WESTFALL, RELATOR

vs.

THE HONORABLE DONALD L. MASON,
Judge, Sixteenth Judicial Circuit
Jackson County, Missouri
Division 11, RESPONDENT

TO: THE HONORABLE DONALD L. MASON, Judge, Sixteenth Judicial Circuit, Jackson County, Missouri, Division 11:

STOP ORDER

WHEREAS, Relator, George R. Westfall, has filed herein his Petition for Writ of Mandamus in which he alleges that unless granted the relief prayed for therein you will exceed your jurisdiction with reference to proceedings in the matter pending before you styled "State of Missouri, Plaintiff, vs. Robert E. Bullington, Defendant," case No. CR78-0768 in your Court, and

WHEREAS, it appearing from the duly verified papers now on file in this Court that unless Relator is granted the relief prayed for therein you may exceed your jurisdiction in the premises,

IT IS THEREFORE ORDERED AND ADJUDGED that you take no further action in this case of any kind or character until further order of this Court, and that

you are hereby given until Thursday, May 24, 1979, to file Suggestions in Opposition to Relator's Petition for Writ of Mandamus herein.

Dated at Kansas City, Missouri this 17th day of May, 1979.

/s/ Ronald L. Somerville
RONALD L. SOMERVILLE
Presiding Judge—Writ Division

cc: Honorable Donald Mason
Richard Sindel
John Walsh

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 30944

STATE OF MISSOURI, EX REL,
GEORGE R. WESTFALL, RELATOR

vs.

THE HONORABLE DONALD L. MASON,
Judge, Sixteenth Judicial Circuit
Jackson County, Missouri
Division 11, RESPONDENT

ORDER

The Court, being now fully advised in the premises,

Denies Relator's Petition for Writ of Mandamus and Alternative Petition for Writ of Prohibition in the above captioned cause, and,

Dissolves the Stop Order heretofore issued herein on May 17, 1979.

Dated at Kansas City, Missouri, this 30th day of May, 1979.

/s/ Ronald L. Somerville
RONALD L. SOMERVILLE
Presiding Judge—Writ Division

cc: Richard Sindel
John Walsh
Hon. Donald L. Mason

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, EX REL,
GEORGE R. WESTFALL, RELATOR

vs.

THE HONORABLE DONALD L. MASON,
Judge, Sixteenth Judicial Circuit
Jackson County, Missouri
Division 11, RESPONDENT

MOTION FOR REHEARING
OR IN THE ALTERNATIVE
TO TRANSFER TO THE SUPREME COURT
EN BANC—June 1, 1979

Relator moves the Court for rehearing in the above cause, or in the alternative, to transfer said cause to the Supreme Court En Banc on the following grounds:

1. The Court in its opinion on May 30, 1979, inadvertently misinterpreted and overlooked the law and facts of this cause by holding that Relator cannot seek the death penalty herein for the reasons already mentioned to Court in Relators petition and suggestion, specifically the ruling of the United States Supreme Court that a higher sentence can be imposed upon retrial.

2. The Court by holding that the State cannot seek the death penalty has failed to follow, and its opinion and decision is in conflict with the controlling decisions of *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714, and cases sighted therein, which have held that a more severe sentence can be sought and imposed upon retrial.

3. Relator respectfully moves the Court in the alternative to transfer this case to the Supreme Court of Missouri on the following grounds:

A. The question involved in this case is of such general interest and importance that the final decision thereof should be made by the Supreme Court of Missouri. In support thereof, Relator states:

1. The Capital Murder statute is relatively new to Missouri and the Supreme Court has not had the opportunity to determine the effect of the bifurcated trial system or the issue of seeking the death penalty upon retrial.

2. The construction of Missouri's Capital Murder statute will effect the populous, lawyers and courts throughout the state on a frequent basis.

B. The decision of this court is in conflict with *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714, and *Stroud* v. *U.S.*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103, and *State* v. *Howell*, 543 S.W.2d 836 (Sp.App. 1970), and *State* v. *Johnson*, 485 S.W.2d 106, and the existing law concerning this point should be reexamined by the Supreme Court.

WHEREFORE, Relator respectfully requests the Court to grant him a rehearing in this case or to transfer the cause to the Supreme Court of Missouri.

Respectfully Submitted,

/s/ George R. Westfall
GEORGE R. WESTFALL
Prosecuting Attorney
St. Louis County, MO
by James J. Cook
Assistant Prosecuting Attorney
St. Louis County, Missouri

Certificate of Service (omitted in printing)

IN THE SUPREME COURT OF MISSOURI

STATE'S ORAL ARGUMENT

Mr. Cook: I am James Cook an Assistant Prosecutor from St. Louis County and in this particular case I represent George Westfall, the Prosecuting Attorney from St. Louis County. This is a Writ of Prohibition, Preliminary Writ issued by this Court on the question of whether or not the State can seek a death penalty upon a retrial of the defendant in this case.

For a little bit of background here in December of 1977, the State filed its indictment against the defendant charging him in 6 counts: Capital Murder, Kidnapping, Armed Criminal Action, Burglary in the 1st Degree and 2 counts of Flourishing a Dangerous and Deadly Weapon.

I might at this point mention that this was filed before the enactment of Rule 2404A.

Prior to trial the case was transferred from St. Louis County to Jackson County on a change of venue. The State filed with the Court and sent copies to the defendant of a Notice of Aggravating Circumstances indicating its intention to seek the death penalty upon the trial of this case.

At that time, in October of 1978, the case proceeded to trial in Jackson County, approximately a 10 day trial at the conclusion of which the defendant was found guilty of all counts. The next day the second stage of the trial was begun, the State introduced evidence as to the aggravating circumstance concerning substantial history of serious assaultive convictions and recalled to the jury the evidence of the case on its other aggravating circumstances being the wantonly vile nature of the offense. After argument by counsel the State, excuse me, the jury retired and returned with a decision that the defendant should be sentenced to life imprisonment without probation or parole for 50 years. But after the defendant filed his Motion for New Trial and the Court sustained

that Motion based on the decision of the Supreme Court of the United States in *State* v. *Duren*, which of course had to do with the jury selection process in Jackson County and a new trial was ordered.

Court: Is that Motion for New Trial in the record?

Mr. Cook: I do not believe it is in the record before this Court on this petition. I did not file it as an exhibit, I do not believe it was filed.

Court: So we don't know what he asked for in the Motion for New Trial, whether he asked for—I guess we don't because it is not in the record.

Mr. Cook: No sir, but a new trial was granted, the ruling of the Court was that the Court was forced to make that ruling based on a decision of *Duren* and a few cases that followed. *Duren* which indicated its retroactivity to a certain extent. The State mostly as a vehicle to get the issue decided again filed a Notice of Aggravation and these are the same aggravating circumstances that were filed at the first case. Defendant filed a . . . .

Court: Is it the same aggravating circumstances now that was filed in the first case?

Mr. Cook: Yes sir, they are.

Court: There are no changes in the aggravating circumstances?

Mr. Cook: No sir.

Court: Okay.

Mr. Cook: That notice I believe is exhibit 1 in the Petition before the Court. The defendant filed a Motion to Quash that Notice and in effect asked the Court to rule that the defendant could not be "in jeopardy of death again" and the trial judge indicated that he would sustain that order or that motion. The State sought a Writ of Prohibition from the Court of Appeals, Western District and it was denied and the State thereafter filed its Motion for Writ of Prohibition in this Court and the Preliminary Writ was issued. The State primarily rests its position that it is entitled to seek the death penalty in the second trial on the United States Supreme Court

decision of *Chaffin* v. *Stynchcombe*. It was a 1973 case. That case was decided after the *Pearce* v. *North Carolina* case. Now the *Pearce* case said that in a Judge-tried case, and a judge-sentencing, the judge on a retrial could not sentence to a harsher sentence the second time without meeting certain requirements including specifying why he was making a harsher sentence and pretty much requiring that the harsher sentence had to be based on actions of the defendant after the first trial. The *Stynchcombe* case refused to extend that reasoning to a jury sentencing situation. And said that in effect a defendant, upon getting a retrial, can be subject to a harsher sentence as long as it is within the range of punishment provided by statute that he received at the first trial. Both *Pearce* and *Stynchcombe* or the *Chaffin* case refer to the *Stroud* v. *United States* case, which is a 1919 decision of the U.S. Supreme Court where the Birdman of Alcatrez was found guilty the first time of murder and given a life sentence and at a subsequent trial was found guilty and given a death sentence. And the Supreme Court of the United States held that that was proper. In both the *Pearce* and the *Chaffin* cases the Supreme Court refused to overrule the *Stroud* case and so it seems to the State that reading both of these cases or all three of these cases together, there is no constitutional prohibition on seeking and receiving the death sentence in a retrial when the defendant has received life the first time.

Court: Do you have any case where there is a bifurcated trial situation such as we have here, where it was held that State could have another crack at the death penalty even though the aggravating circumstances that they were going to show at the second trial were the same as those in the first trial on which they lost?

Mr. Cook: The only case that we have been able to find, actually there are two cases, both out of Georgia, one is cited by defendant in his brief, *State* v. *Ward*, which is a Georgia Supreme Court decision. In that

Supreme Court case, or Georgia case, the Court seems to indicate that there is no constitutional prohibition against this, but bases its ruling on the statutes, in the statutes involved, and speaks to the disproportionateness of the decision, and I will get to that.

Court: Well, then that's the only case you know of that is presented, that's had this question presented?

Mr. Cook: I have recently found one other case out of Georgia, *Redd* v. *State*, in which the defendant—it's not really the same situation, the defendant received death in both first trial and second trial, but in that case the State added aggravating circumstances the second time and the-the Court had no problem with that. Those are the only two cases under the bifurcated system that I know of. Now, the Court in *Chaffin*, in a footnote speaks about the possibility of what a bifurcated system would do to their decision and without necessarily speaking of a death penalty situation, speaking just in general terms of bifurcated systems on sentencing, discusses the fact that they do not think that the bifurcation alone would remove . . . would change the *Chaffin* decision. In other words, the bifurcation alone would not put it back into a *Pearce* type situation.

Court: What bearing do you think would *Burkes* case, I think it is Burkes isn't it, that holds that if they don't have something new the second time around they can't try the defendant again? Isn't it *Burkes* v. *United States* . . . the double jeopardy case that was handed down fairly recently?

Mr. Cook: I'm afraid to say I'm not familiar with that case.

Court: That's the one that holds, I'm pretty sure, that if the State doesn't make a submissible case, they can't have a second crack at it or if they have lost on the issue, they can't have a second crack at it. What's the difference between in principle between that and the situation here where you have lost on the death penalty effort but now you want to do it again?

Mr. Cook: Right, the distinction I feel your Honor, is this. In the various cases, the *Redd* case in Georgia speaks of it, and the *Johnson* case out of . . . from this Court talks about what double jeopardy is and in both cases the distinction is made between double jeopardy, double jeopardy applies to convictions and not to punishment. The analogy that perhaps I would suggest to the Court is in the *Johnson* case from Missouri, this is a case that was decided in the early 70's but referred to a trial in the early 50's. And at that time the jury was required under the habitual criminal statute to decide whether or not prior convictions had been proven. In the first case . . . trial of Mr. Johnson, the State attempted to prove a couple of prior convictions, the jury was silent in their verdict as to whether or not they found that those prior convictions existed. The second trial—the State again presented to the jury evidence of those prior convictions and the defendant argued that that's double jeopardy. The jury having been silent on it the first time, has made the final determination of that and you can not again try him on that issue. The Supreme Court of Missouri in the *Johnson* case specifically mentions and if I may read very briefly and I think this is analogous. "The habitual criminal act goes only to the punishment not the guilt or innoncence of an accured of the offense on trial. The double jeopardy clause of the Fifth Amendment is written in terms of potential or risk of trial and conviction not punishment. The double jeopardy clause as we have noted is cast in terms of the risks or hazard of trial and conviction not of the ultimate legal consequences of the verdict. Given such meaning of the double jeopardy clause and the nature of the second offender act, the double jeopardy clause is not here applicable."

It is my suggestion that the habitual criminal statute as applied in the earlier 50's is analogous to the bifurcation system here. The jury determination of whether or not aggravating circumstances exist only goes to the legal consequence of the verdict.

Court: Then when you have the total judgment set aside because the jury was improperly constituted rather than for some trial error or some other thing that perhaps does not even (intelligible). Where it starts at the inception it vitiates the whole thing because the jury was improperly constituted—are you going to touch on that or does that make this case somewhat different than others?

Mr. Cook: I think it applies here. The decision is that the jury was improper, it was an improper jury. Now, I think that it is probably clear that if this jury, although it was paneled improperly, had actually acquitted the defendant of capital murder and found him guilty of murder 2nd, I think that double jeopardy would probably preclude us from going forward with capital murder even though the jury was improperly impaneled. But in this particular situation, I think where we are not really talking double jeopardy, I think that that is an important distinction to be made that the defendant can not have it both ways. I believe that that particularly the *Chaffin* case and to a certain extent the *Johnson* case out of Missouri touch on all of the major complaints that the defendant has as to why he should not be sentenced to death a second time. The double jeopardy situation I have already alluded to. The collateral estoppel issue—the jury was silent in this case as to whether or not it found that the aggravating circumstances existed. It is my position that the instructions as given to the jury, leave us not knowing whether the jury found the aggravating circumstances existed or did not. If the law was such that if the jury found aggravating circumstances existed they had to give the death penalty, then the fact that they came back with life would indicate that they did not find the aggravating circumstances existed. However, our statute and instructions allow them to find that the aggravating circumstances exist and write them down and get the death penalty and we can find that the aggravating circumstances exist but are out-

weighed by the mitigating circumstances, or they can find that the aggravating circumstances exist and are not outweighed by the mitigating circumstances but still they don't want to give the death penalty. In one of these last situations is the jury required to make an affirmative finding that they do or do not. So in effect we do not know what the jury ruled, we know that they didn't give death, but we don't know why. That's why I do not think that collateral estoppel is applicable because there has been in effect no final determination of that issue that we can really get our hands on.

Court: So you can't really argue that the jury didn't give him death because they found aggravating circumstances, can you?

Mr. Cook: I'm saying . . .

Court: That's what you are coming around to. Your argument would permit you to say well they didn't give him death but they did find aggravating circumstances.

Mr. Cook: I'm saying we don't know your Honor.

Court: Well we do know that they didn't give him the death penalty.

Mr. Cook: Right, which could be because they didn't find the aggravating circumstances exist or they did find the aggravating circumstances exist but they still didn't want to give him death.

The other issues brought forth by defendant include such things as vindictiveness and chilling effect which the *Chaffin* case surely talks of both of these, I would argue that the cases cited by the defendant, if you forgive me I'm going to use the terms defendant state and trial judge since in both cases, the relators change, it gets rather confusing The State will point out that the defendant's cases such as *Green* did not apply because there the first time he was convicted of murder 2nd and the second time he was convicted of murder 1st, that's clearly not the type of situation we have here. *Blackledge* was a misdemeanor that he was convicted on, then in a trial de novo the State filed a felony indictment. Those are

clear indications of vindictiveness. *Chaffin* seems to say that the fact that the jury does the sentencing and as long as the jury does not know what the first sentence was, this vindictiveness is taken care of, and also the state is not asking for any higher sentence than it did ask for in the first case. And *Chaffin* also talks about the chilling effect on the right to appeal. There are some cases of course that indicate that certain situations give rise to impermissible chilling effect on the right to appeal and *Chaffin* recognizes that but as in the *Jackson* case which was cited by the defendant, the *Chaffin* court specifically mentions that this *Jackson* case is a very narrow ruling and that all decisions that the defendant is required to make are going to be difficult decisions, and may in effect, have a chilling effect on his rights to appeal, but the question is-is it an impermissible chilling effect. And it seems to me that *Chaffin* read along with *Stroud* indicates that there is no impermissible chilling effect upon the right to appeal even in a death situation. The last point raised by defendant is the disproportionateness of this possibility of getting death a second time. The *Ward* case is the case out of Georgia where the defendant was sentenced to life imprisonment the first time around and given death a second time.

Court: Is that case in your brief?

Mr. Cook: It is in . . . in the other one.

In that case he was found guilty and given life the first time, death the second time and the Court by looking at the statute which says that the Court shall look at similar cases and similar types of situations and similar defendants shall determine whether or not this decision is disproportionate. I have three main reasons why I would ask this Court not to follow the Georgia ruling on this issue. One, I believe that this is an improper view of the intent of the statute. I think the intent of the statute was to look at several types of cases, for instance, if we have within the last several years, we have three or four capital murders which arose out of Quick

Shop, gas station, proprietor type of holdups, and in three cases the defendant is given life and in the last case was death, and the Court has to look at that and determine that this is disproportionate. I think also there is a certain racial issue here is attempted to be taken care of. The challenge is often been made that it is only blacks that get the death penalty. This takes care of that. We have three cases where the defendants were white and got life in a very similar situation where the defendant is black and got death. This Court can take care of that situation. Secondly, I would argue that it is premature at this point to rule that the death penalty in this case would automatically per se be disproportionate. One, this Court does not know what the evidence of the first case is, does not know what the evidence in the second case will be. Now the dissent in *Ward* makes a point of this. That the evidence in the second case is much stronger. I do not intend to tell this Court that the evidence in my case is going to be stronger. I anticipate that it will not, but I think that the Court would be setting a dangerous precedent if it now, even without looking at the evidence makes a per se ruling that it would in effect have to deal with in the future. In . . .

Court: What's the dangerous precedent that we would be setting?

Mr. Cook: I think if you automatically say that not for any constitutional reasons but for this disproportionate requirement in the statute, that everytime a defendant is given life the first time, he can not possibly be given death a second time, then I think there could come a situation. . .

Court: We are not quite required to say that here, because you have said to us, and I appreciate your candor, that your evidence is going to be the same this time.

Mr. Cook: Yes.

Court: So that we are really not forced to go as far as you say in this case.

Mr. Cook: No, but I think that if the Court would make this ruling at this time, in effect you'd be making a ruling without any knowledge of what the evidence was, whether it was a strong case to begin with or not a strong case to begin with the first or the second time. And you would be setting a precedent that might be difficult to deal with in later cases when you might want to look at the evidence and I think of course the Court could overrule it or change the precedent but I think it would be a precedent that you would be making without the benefit of the facts and the evidence in the case which I think you would want.

Thirdly, I thing it is faulty reasoning. The Court is required by the statute to look and see whether the death penalty in a particular case is disproportionate to similar cases and I stress the fact that is used the plural, "cases" is used. But you have two things, the first trial and the second trial, how can you say one is disproportionate to the other? You have two things, is one too large and the other one too small? I don't think that logically you can decide disproportionateness when you only have two things to compare and I think that the statute envisions this and says similar cases so that later you can say there are three cases that go this way, therefore, this case is disproportionate.

Court: What would we do with the very first case we get then?

Mr. Cook: I think that . . . I believe it is the *Gregg* case mentions that it was not unconstitutional for the Georgia court to consider capital death penalty cases which arose before the new statute was enacted so that means you can go back to other death penalty cases over the years. It is a difficult situation I realize but I think it can be overcome.

Also, brough out in the dissent in the *Ward* case is how do you determine what to do the next time when this type of situation arises? For instance, in this case, in the first trial we have a kidnapping and what the State is

describing as a brutal murder of a young woman by drowning her, the first jury gave the defendant life imprisonment. Let's assume that you allow us to go forward and the second jury gives death, but you at that time ruled that automatically that's disproportionate, therefore it is life. What happens two years later and you have a similar siuation and the jury gives death? Then in effect you've got two death juries and one life jury. And so it would seem that the life now is disproportionate. But because you have applied the per se rule, which I would submit is illogical, you then would be going the other way and saying the third case must be disproportionate. And as the dissent points out in *Ward* which case do you look at in later cases. Do you look at the first case that came back with life to compare a later case or . . .

Court: I worry about the comparison, that's going to be an important factor I would agree, but certainly the use of the case for a comparison basis is not near as important as the case itself when you are dealing with whether or not the death penalty should be imposed.

Mr. Cook: I would agree.

I think this a, what I think would be a side issue as to some of the consequences of what I think might occur if the Court would make this (intelligible). That's all I have. Any further questions? Thank you.

PORTION OF PETITIONER'S ARGUMENT

Mr. Sindel: I also believe that there is some merit to the point that we make that the two provisions under which the State wishes to proceed, that is that the defense was horrid, vile, wanton or that there is a substantial history of serious assaultive convictions runs into severe problems under the Fourteenth Amendment Due Process Clause for being vague and overbroad. For example, in the case at bar the evidence was that substantial history of serious assaultive convictions were two. Now perhaps if the legislature had said more than one, then we would know, but we have no determination and there is no guideline given to the jury as required in *Gregg* for what a substantial history is. Then we have to determine are these serious assaultive crimes, does serious modify crimes? And if that is the case, does it mean felonies, or does it mean that the assault itself is serious in that it involved perhaps bodily harm or serious threat.

Court: Pardon me, we have one minute left on your time.

Mr. Sindel: I don't believe . . .

Court: May I ask a little bit of that minute?

Mr. Sindel: Yes.

Court: I know that in *Duren* it was suggested that this court hadn't kept up with the law very well about taking the juries, but they have had capital murders particularly in Georgia and those places. Have you had any one particular case wherein there was a reversal, it couldn't have been perhaps for a Duren reason, but for any trial reason and went by and a decision was made the way you are going, to you have some of them cited here?

Mr. Sindel: The case we cited, the best case . . .

The Court: I mean since the bifurcated approach to life.

Mr. Sindel: It is the *Ward* v. *Georgia* case.

The Court: Ward v. Georgia.

Mr. Sindel: Now, in the particular case the State refers to the fact that the tribunal did not find that there was any violation of the constitution, that is not my interpretation, nor do I believe it is the correct interpretation of what the case says. My belief is that the case says we don't have to reach those determinations because we have decided that if it is the same trial, the death penalty is going to be substantial and disproportionate to a sentence in the second trial. That is the only case that I know that proceeded directly in point. On the point of whether or not that particular provision is vague or overbroad, there is cited in the *Gregg* case a Georgia case, *Arnold* v. *State*, 224 S.E.2d 386, which holds that the provision of substantial history of serious assaultive convictions is vague and overbroad. Thank you.

STATE'S REBUTTAL

Mr. Cook: I'll just take a few moments to answer a few of the things I might mention that the *Ward* case was originally reversed because of the error in alibi ruling (intelligible)

Court: Did you say, I couldn't hear, the *Ward* case?

Mr. Cook: Yes, it was an alibi problem in his first case.

Court: It may be that from the respect that the fact that this was set aside because of *Duren*, would be incorrect. If that thought were correct then if a person were convicted of a lesser included offense then the case were reversed because of jury conduct or misconduct or whatever, then in all those cases they could go back and try the fellow again for the higher offense. That would probably be in violation of a case or two wouldn't it?

Mr. Cook: I think it would. That's why I think it is important to make the distinction here that the second part of a bifurcated trial does not come under the double jeopardy.

Court: Let me ask you this, is this correct, you do not rely upon the fact that this case was reversed under *Duren* as of any significance?

Mr. Cook: I think it is an interesting side light, I don't rely upon it, It is an important aspect.

Court. Alright, thank you.

Court: If this matter hadn't appealed he'd be over in the penitentiary today, wouldn't he?

Mr. Cook: Yes.

Court: Despite that jury.

Mr. Cook: Yes.

First, I would like to ask the Court to find that what Mr. Sindel is asking the Court to find that that it is a legal fiction. There are not two statutes, there are not two offenses, there is one, Capital Murder. The question is how is that person to be punished. In the cases that

I cited, the *Johnson* case and several others, make a definite distinction. The aggravating circumstance in this situation I do not believe is an element of anything. It's given rather important significance in that they must find it beyond a reasonable doubt but it's not an element of . . .

Court: Is there any . . . Is there anything comparable in the State of Missouri that you can think of in the criminal law?

Mr. Cook: The only thing that I can think of was what I read earlier from the Johnson situation which used to be the case where the jury had to determine whether or not the habitual criminal statute applied.

Court: But then the punishment was automatic.

Mr. Cook: I believe so.

Court: It was the highest that could be charged?

Mr. Cook: Right, but . . .

Court: In the capital murder statute of Missouri, you say it really isn't two statutes, I don't know how—I'm not sure, I don't know whether they are subsections.

Mr. Cook: Sections.

Court: But if a person is convicted of capital murder, is this correct: He will be sentenced to life unless the jury, if it's before a jury, makes certain affirmative findings and concludes that he shall be sentenced to death.

Mr. Cook: That's correct.

Court: So that in order to get to the death penalty part, to that end result, it is not that it's necessarily based upon what was heard in the first part of the trial into considerate, but it does require affirmative findings.

Mr. Cook: Yes.

Court: Then how does that—then why is that not, why is that not comparable to, not a separate crime necessarily, but at least a sufficiently and significantly separate proceeding that it should be allowed to stand on its own feet.

Mr. Cook: I guess two reasons. One is the historic view of double jeopardy, that it is not both punishments. Now, the court can take that next step and say yes, capital murder is sufficiently different from capital murder situation, and the death penalty is sufficiently serious step we wish to apply it, but I think the Court would be going against the historic view.

Court: Well, I guess I'm kind of interested in is this, I don't have any quarrel with what you say with respect to the historic view, except that in the historic views are cases, where can we find one where the punishment . . . that strain of punishment or that aspect of the case required the State to proceed but on further evidence and then required a jury to make specific further findings, where can we find that in the history?

Mr. Cook: But I think, don't we have that to a certain extent in the old habitual criminal situation where they had to affirmatively find that required convictions existed before that next sentencing came into effect. Now clearly there are basic distinctions there. The other situation is this *Redd* v. *Georgia* case which is not cited in any of the briefs where the . . .

Court: R-e-d?

Mr. Cook: Right. R-e-d-d, 236 S.E.2d 365. The Supreme Court of Georgia.

Court: Will you do the same as . . .

Mr. Cook: Yes.

Court: The other gentlemen . . . give us a letter pretty quick.

Mr. Cook: I just gave you the cite to *Ward* so I apologize there. But the *Redd* case, as I mentioned earlier, the State . . .

Court: Are you saying Ward or Redd?

Mr. Cook: Now I am on Redd. R-e-d-d—Redd.

Court: Redd, I though (intelligible).

Mr. Cook: Excuse me. The *Redd* case, the first trial, the Court, the State gave three aggravating circumstances to the jury, and the jury stopped after finding

one of them and it was not clear, as it is not clear here, whether they found that the other two didn't exist or they just didn't go to them or whatever. The case was overturned for a reason I don't recall. The second time, the court, the jury was again given the three. Now, I think maybe even an extra one. Don't hold me to that. The Court had no problem with that. I think that if if the Supreme Court of Georgia, which apparently has had more opportunity over the years to decide these things, they have no problem with that holding that that is some sort of jeopardy, because clearly if the lack of finding an aggravating circumstance brings into effect double jeopardy, you could not bring that aggravating circumstance again in a later trial, and in effect they allowed that to happen in this particular case.

Court: But they gave him death in that one on the first time around.

Mr. Cook: Yes sir, both.

Court: May I ask this, doesn't this tell us that there is just one crime charged and that the second proceeding on the matter of determining the punishment is a part, a continuing part of the first and of the principle case, because the jury as I understand it, is charged with responsibility of considering all the things that they heard at the outset and all the qualities of the evilness of the crime or of the non-evilness of the crime. The heinousness or whatever so that that goes right on and is a (intelligible) and as I understood the thrust of the Supreme Court of the United States and its various cases where it has dealt with this problem of capital punishment, the irony is then we are going to extend an additional offering to the accused to give him a chance to, if you will, escape the death penalty and we are going to insist that there be a final evaluation of the of whether the death penalty should or shouldn't be awarded, after he has been found guilty of the crime of the capital murder and so it isn't if you will, seems to me a new concept of double jeopardy, but it's a matter of an additional benefit offered to the accused.

Mr. Cook: I agree. I think though that if the court would hold that this somehow is double jeopardy that that would be a new concept and of course would not be the result that I would ask for. Let me say that I think the Court, I don't know that the Court would want to, but this problem perhaps could be corrected if the instructions were made that you have to have a yes or no answer to each aggravating circumstance. Yes we find this aggravating circumstance to exist and we give death or no we do not find it and therefore we give life, or yes we find it. I think . . .

Court: I think that those aspects were probably already considered by the Court and under the statute, it's life unless there is affirmative findings of the aggravating circumstances plus a determination by the jury to impose death.

Mr. Cook: Right. I am not suggesting that the Court would want me to do this, I am suggesting that this would be one way to perhaps avoid the problem and I would not ask the Court to do it at all.

Two other points I would like to mention, briefly, I would I think I should deny on the record any indication of vindictiveness on the part of me or my office. I think that how we asked for and argued for the death penalty the first time and how we do it the second time is merely a matter of trial strategy and not to be considered in light of whether or not it is vindictive. Also the jury in the second trial should, I would assume, will not know how the State argued at the first trial.

Court: This question has been probably asked you, is there any difference in a reversal by a trial error for something or this *Duren* case where the State may itself kind of goofed up the deal by having a jury paneled there that was later disapproved by the Supreme Court of the United States. Is there any distinction at all, I mean, can we say here that I think Judge Higgins asked it, but there never has been a trial. That's kind of farfetched I presume, isn't it, to say that this man was

never in jeopardy in the first place because it was an illegally constituted jury and whatever they did was a total waste of time? Can we get by with that argument?

Mr. Cook: Well you can try. Laugh. I still have never forgiven Mr. Sindel for picking or convincing the trial Judge of St. Louis County to pick Jackson County of all of the counties in the State we could have gone, we picked the County with the Duren problem. But I don't think that, as I say, I think it is an interesting side light in one that may add light to how you would wish to rule. I would not think that you would be able to couch a ruling upon that, in that argument. Also on the vagueness of the statute I think again it is improper untimely for this Court to decide the constitutionality or the vagueness of the aggravating circumstances at this time since we do not have before you the evidence which I think would certainly add light to that and to a certain extent the Gregg decision by the Supreme Court has given at least tout approval to the wording in the aggravating circumstances. Thank you very much.

[SEAL]

SUPREME COURT OF MISSOURI

EN BANC

No. 61499

STATE EX REL. GEORGE R. WESTFALL, RELATOR

v.

HON. DONALD L. MASON, Judge, 16th Judicial Circuit, RESPONDENT

OPINION—Filed Feb. 11, 1980

I

Prohibition, to prevent respondent, the Honorable Donald L. Mason [1] Judge of the Sixteenth Judicial Circuit, from proceeding in the retrial of Robert Bullington for capital murder (the indictment charged numerous offenses) without allowing the prosecution to seek imposition of the death penalty.

Prior to trial in 1978 the State under § 565.006(2), RSMo 1978,[2] filed a "Notice of Evidence in Aggravation" announcing its intention to seek the death penalty in the capital murder charge. That trial resulted in a verdict of guilty on all counts including capital murder, October 11, 1978. A hearing was conducted the next day under the bifurated procedure mandated by § 565.006,

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[1] Defendant was charged in the Circuit Court of St. Louis County by indictment with capital murder, kidnapping, armed criminal action, burglarly first degree and two counts of flourishing a deadly weapon. The cause was transferred on change of venue to the Sixteenth Judicial Circuit in Jackson County, Missouri.

[2] See also § 565.006, RSMo Supp. 1979 (as amended) (effective date September 28, 1979).

RSMo 1978, in which the jury was presented additional evidence in "extenuation, mitigation, and aggravation" of punishment. The jury directed that defendant be sentenced to life imprisonment without probation or parole for not less than fifty years.

Defendant's motion for new trial, challenging the constitutionality of the Jackson County jury panel, was sustained February 13, 1979, in light of the United States Supreme Court's holding in *Duren* v. *Missouri*, 439 U.S. 357 (1979). In preparation for Bullington's retrial the State has filed a second "Notice of Evidence in Aggravation" indicating its continued intention to seek the death penalty.[3] Responding, defendant moved to strike that "Notice" and to exclude from trial all evidence in aggravation of punishment. Respondent announced his intention to enter an order sustaining defendant's motion to strike, "to the extent that the state will not be permitted to seek the death penalty, should the defendant again be found guilty of capital murder." Relator then sought prohibition and for reasons now discussed, our preliminary rule heretofore entered is made absolute.

II

Respondent first contends prohibition is inappropriate procedurally because (1) relator (Prosecuting Attorney of St. Louis County) failed to allege the State had no adequate remedy at law, (2) that the state's limited right of appeal forecloses resort to prohibition, and (3) the issue does not involve the jurisdiction of the trial court. The first contention may be disposed of summarily. On October 2, 1979, by order of this Court relator was permitted to amend its petition and allege the State had no adequate remedy at law. As to respondent's second

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[3] The notice advises the State will present evidence of two aggravating circumstances. First, that the killing was committed by a person with substantial history of serious assaultive convictions. § 565.012.2(1), RSMo 1978. Second, that the offense was outrageously or wantonly vile, horrible or inhuman. § 565.012.2(7), RSMo 1978.

argument it is precisely because the state has an extremely limited right of appeal under § 547.210 RSMo 1978, and Rule 28.04 (now Rule 30.02) that extraordinary relief is proper to review interlocutory orders in criminal cases. See *State ex rel. Corcoran* v. *Buder*, 428 S.W.2d 935, 939 (Mo. App. 1968). Further, it is settled law that, "The writ is properly invoked to restrain the enforcement of orders beyond or in excess of the authority of a judge and to keep a court within the compass of its jurisdiction." *State ex rel. Vogel* v. *Campbell*, 505 S.W.2d 54, 58 (Mo. banc 1974). Because, as we shall presently discuss, neither the federal nor state constitutions nor Missouri law prevent Bullington from being subject to the death penalty on retrial, the trial court exceeded (or by its announced order would have exceeded) its authority in denying the state leave to seek imposition of the death penalty. Accordingly, prohibition lies. See *State ex rel. Peach* v. *Bloom*, 576 S.W. 2d 744 (Mo. banc 1979).

III

The principal question for our determination is whether on retrial the death penalty under § 565.008, RSMo 1978 is barred as possible punishment by constitutional or statutory considerations. Respondent argues that because the jury in the first trial convicted Bullington of capital murder but sentenced him to life, the fifth amendment's prohibition against double jeopardy, the eighth amendment's proscription of cruel and unusual punishment, the fourteenth amendment's guarantee of due process and § 565.014.3(3), RSMo 1978, prevent the State from continuing to seek the death penalty. Long settled constitutional doctrine enunciated by this Court and reiterated in recent decisions of the United States Supreme Court leads to rejection of these challenges.

A defendant successfully overturning a conviction for a particular offense may in most instances be retried for

that *offense* notwithstanding double jeopardy doctrine.[4] *United States* v. *Ball*, 163 U.S. 662, 672 (1896); *Forman* v. *United States*, 361 U.S. 416, 425 (1960); *United States* v. *Ewell*, 383 U.S. 116, 121 (1966). In some cases the rationale for such results has been couched in language of a waiver theory and in others that retrial constitutes but continuing jeopardy. However the rule is more usually described in terms of policy considerations. As Mr. Justice Harlan explained in *United States* v. *Tateo*, 377 U.S. 463, 466 (1964),

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principal for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

Essentially respondent argues that the federal double jeopardy clause prohibits not the retrial for the *offense* of capital murder (Bullington *was convicted* of that *of-*

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[4] For a limited exception to this rule see *Burks* v. *United States*, 437 U.S. 1, 18 (1978).

fense) but only the imposition of a more severe punishment upon retrial. Such contention was squarely rejected sixty years ago in *Stroud* v. *United States*, 251 U.S. 15 (1919). There defendant[5] was convicted in a second trial for the murder of a prison guard and sentenced to life imprisonment by the jury. On retrial (his third) secured by Stroud, the new jury also convicted him of first degree murder and he was sentenced to death. The Court held the fact that Stroud was subjected to the increased punishment of death upon retrial did not place him in double jeopardy. In *North Carolina* v. *Pearce*, 395 U.S. 711, 720 (1969), the Court reaffirmed that a necessary corollary of the power to retry a defendant is the state's power to impose any legally authorized sentence upon reconviction, though greater than the sentence originally imposed. In refusing to depart from an unbroken 75 year line of decision supporting this principle, the court explained, "[T]he original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *Id.* at 721. Recently the Court referred to Stroud as a "well-established part of our constitutional jurisprudence" and specifically declined an invitation to discard the principles stated there. *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 24 (1973). Within the past year the United States Court of Appeals for the Sixth Circuit, following *Stroud* and rejecting this same argument, held that the fifth amendment does not forbid imposition of the death penalty on retrial of defendant for an offense upon which he was originally sentenced to life. *Gully* v. *Kunzman*, 592 F.2d 283, 289 (6th Cir. 1979), *cert. denied*, 99 S. Ct. 2850 (1979).

Despite respondent's stated intention to circumvent the effect of *Stroud* and the decisions following it, we find nothing in the federal constitutional guarantee against double jeopardy to prevent the state from seeking the death penalty on Bullington's retrial for capital murder.

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[5] Stroud was popularly known as the "Birdman of Alcatraz."

Respondent quite untenably suggests that the legislature has bisected the crime of capital murder defined in § 565.001, RSMo 1978.[6] He argues that if life imprisonment is the penalty imposed, the offense is somehow transfigured and changed into a *lesser included offense* of capital murder with capital punishment and becomes the crime of capital murder without capital punishment. Thus, he concludes, the jury's imposition of life imprisonment implicitly constitutes an acquittal of the greater offense. We are unwilling and indeed are unauthorized to indulge such fiction. It is not our prerogative to create separate crimes from those defined by statute. The simple fact is that capital murder under § 565.001, RSMo 1978 is a single crime with the range of punishment established by the legislature at life imprisonment without probation or parole for 50 years to the death penalty. Respondent's argument not only runs contrary to the decided cases, it ignores the statutory sections which define capital murder, prescribe the punishments for that offense, and detail the procedures for imposing those punishments. As noted above, there is but one crime defined as capital murder and the acts proscribed are specified in § 565.001. It was for that offense Bullington stood convicted following the first trial and it is for that offense he remains charged and awaits retrial.

As recognized by this Court in *State* v. *Duren*, 547 S.W.2d 476, 478-480 (Mo. banc 1977), federal constitutional requirements forbad mandatory imposition of capital punishment. In response to the constitutional directive that the jury's discretion in capital sentencing be "suitably directed" so as to minimize the risk of arbitrary and capricious application, *Gregg* v. *Georgia*, 428

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[6] Section 565.001, RSMo 1978, provides: "Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder."

U.S. 153, 189 (1976), and that consideration of the individual circumstances of each offender and crime was "constitutionally indispensable," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976), the Missouri legislature enacted § 565.006 and § 565.012, RSMo 1978, providing for a presentence hearing following a conviction for capital murder at which time aggravating and mitigating circumstances as to the offender and the offense would be considered.[7] The existence of these sentencing procedures does not alter the fact that capital murder by statutory definition § 565.001, RSMo 1978, is a single offense, namely the unlawful, willful, knowing, deliberate and premeditated killing of another human being. The jury, in the § 565.006 proceeding, does not reconsider the issue of guilt, for that has been previously determined. Instead, at that stage they decide only the punishment to be imposed. In sum, the fact that the jury will consider *the range of punishment* for the offense of capital murder does not as respondent argues rend the crime of capital murder and create discrete offenses. The *Stroud* court dismissed such argument stating, "The fact that the jury

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[7] The United States Supreme Court clarified the constitutional standards for imposition of the death penalty in five opinions announced in 1976. *Gregg* v. *Georgia*, 428 U.S. 153 (1976); *Jurek* v. *Texas*, 428 U.S. 262 (1976); *Proffitt* v. *Florida*, 428 U.S. 242 (1976); *Woodson* v. *North Carolina*, 428 U.S. 280 (1976); and *Roberts* v. *Louisiana*, 428 U.S. 325 (1976). In these opinions the court struck down as unconstitutional the North Carolina and Louisiana statutes providing for mandatory imposition of the death penalty and upheld the capital sentencing procedures enacted by Georgia, Texas and Florida. As explained in *Gregg*, "[T]he concerns expressed in *Furman* that the penalty of death should not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Gregg* v. *Georgia*, 420 U.S. 153, 195 (1976).

may thus mitigate the punishment to life did not render the conviction less than one for first degree murder." *Stroud* v. *United States*, 251 U.S. 15, 18 (1919). See *Redd* v. *State*, 242 Ga. 876, 252 S.E.2d 383, 389 (Ga. 1979), *cert. denied*, 99 S. Ct. 2870.

Respondent also argues that the doctrine of collateral estoppel as embodied in the fifth amendment's protection against double jeopardy forecloses the state from seeking the death penalty if Bullington is again convicted of capital murder, and points to *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970). In *Ashe* the concept of collateral estoppel was elevated to the level of double jeopardy. There several poker players at their game table were robbed. Defendant was tried and acquitted for the crime of robbing player #1. An element necessary for conviction of that crime, (identity of the accused as the robber) was found against the State and defendant acquitted under his theory of alibi. In a later trial for the robbery of poker player #2 the Court deemed it double jeopardy to relitigate the identity issue. The *Ashe* Court stated that whether an issue of ultimate fact necessary for conviction is determined by a general jury verdict requires a court, "to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe* v. *Swenson*, 397 U.S. at 444.

Respondent argues that a finding of no aggravation is necessary to the first jury's finding that defendant suffer life imprisonment rather than death for the crime of capital murder; hence the State is estopped from seeking to prove aggravation in the second trial. This contention is without merit for a number of reasons. A rational factfinder might well premise its imposition of life imprisonment on various factors other than the absence of aggravation. The applicable instructions drafted by the Supreme Court Committee on Patterned Criminal

Charges and Instructions for death penalty proceedings demonstrate this option in the jury. Under MAI-CR 15.42 if the jury finds that at least one of the statutory aggravating circumstances exists, it must decide whether it is a "sufficient aggravating circumstance" to warrant the imposition of the death penalty. Even then the jury need not impose death if in its weighing process it intuitively feels the mitigating circumstance(s) tips the scale against the death penalty. MAI-CR 15.44. Finally, though the jury finds that sufficient mitigating circumstance(s) have not been shown, defendant is given the further benefit of our Instruction MAI-CR 15.46 which provides: "[Y]ou are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you." Thus the predilections of the jury as to mercy and the death penalty remain a part of the system within the limits and safeguards established by statute.

Clearly the first jury might have imposed life imprisonment in response to a defendant's plea for mercy rather than finding no aggravation. *Ashe* v. *Swenson* is inapposite here and the State is not precluded from seeking the death penalty by any aspect of the fifth amendment's protection against double jeopardy.

Respondent, relying on *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), next argues that allowing the prosecution to seek the death penalty, should Bullington be reconvicted of capital murder, would violate principles of due process in that a finding of capital punishment by the jury at retrial would be "tainted by vindictiveness." However, *Pearce* is not controlling here. In that case, defendant's conviction was reversed through collateral attack but on retrial he was again convicted and when resentenced by the court received more severe punishment than that originally imposed. *Id.* at 713-714. The *Pearce* Court concluded, "Due process of law, then, requires that *vindictiveness* against a defendant for having successfully attacked his first conviction must play

no part in the sentence he receives after a new trial . . . . [D]ue process also requires that a defendant be freed of apprehension of such a retalitory motivation on the part of the *sentencing judge*." *Id.* at 725. (Emphasis ours.) This exposure to possible vindictiveness of the sentencing judge does not occur in the jury sentencing process under Missouri's capital murder statutes.

The due process clause is not violated by all possibilities of increased punishment upon retrial, "but only by those that pose a realistic likelihood of vindictiveness." *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974). See *Colten* v. *Kentucky*, 407 U.S. 104, 116 (1972). *Ludwig* v. *Massachusetts*, 427 U.S. 618, 627 (1976). In this connection the Supreme Court held recently that Pearce-like restrictions were inapplicable in *jury resentencing* at least where improper and prejudicial information regarding the prior sentence is withheld. *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 28 (1973). The *Chaffin* court found the potential for vindictiveness in jury resentencing, de minimis for these reasons: First, a retrial jury in the normal course of events will be unaware of the disposition of the prior proceeding. Second, juries, unlike a trial judge, who has been reversed on appeal, will have no personal stake in the prior conviction and no motivation to engage in self-vindication on remand. Third, juries will not be sensitive to the institutional interests which might be promoted by imposing higher sentences after appeal as a means of discouraging meritless appeal. *Id.* at 26-27.

Respondent, in a final attempt to circumvent the clear import of *Chaffin*, suggests that because that case did not involve a bifurcated proceeding as provided under the Missouri capital murder statute, the holding there does not control our case. However, this overlooks the fact that *Chaffin* states:

> While some jury-sentencing States have adopted bifurcated jury trials, in which the jury assesses the punishment in a separate proceeding after a verdict

> of guilty has been rendered [citations omitted], bifurcation alone would not wipe away the fundamental differences between jury and judicial sentencing. It may make little sense to supply the jury with information about the defendant's conduct if the goal of jury sentencing is not necessarily to fit the punishment to the offender, and if the jury is, therefore, not concerned about matters considered pertinent to judicial sentencing.
>
> Petitioner and recent court of appeals cases suggest that an approximation of the *Pearce* limitations could be realized either by instructing the jury that it may return no verdict higher than the former sentence, or by empowering the judge to reduce the second sentence whenever it exceeds the former sentence. [citations omitted.] Although these alternatives would provide an absolute protection from the possibility of vindictiveness, they would also interfere with ordinary sentencing discretion in a manner more intrusive than contemplated by *Pearce*. They would achieve, in the name of due process, the substance of the result we have declined to approve under the Double Jeopardy Clause.
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> *Id.* at 28 n.15.

Such constraints upon jury discretion as those urged by respondent would be particularly unfortunate in the capital sentencing area where individualized consideration of each offender is constitutionally required. *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978).

Missouri decisions, prior to *Chaffin*, recognized that "vindictiveness" has no relevance to jury resentencing. See *Spidle* v. *State*, 446 S.W.2d 793, 795 (Mo. 1969). *Kansas City* v. *Henderson*, 468 S.W.2d 48, 52-53 (Mo. 1971), *cert. denied*, 404 U.S. 1004 (1971). Accordingly, we find that as a jury will decide whether Bullington should be subject to the death penalty if he is reconvicted of capital murder, there is no realistic likelihood

of vindictiveness on retrial. It is appropriate to reemphasize that defendant has been awarded a retrial which *he sought* and it does not violate due process to permit such trial for the crime he was originally and still stands charged. Nor does the award of a new trial alter the range of punishment prescribed by the statute. The decision as to punishment under the prescribed procedure is that of the individual jury, not to be engrafted upon or controlling of a new jury not yet empaneled. To hold otherwise would distort the clear purpose of the statutory scheme which offers protection against aberrant results by establishing a system that allows the trier of fact (1) to determine guilt or innocence without the distraction of evidence irrelevant to that issue (§ 565.006), (2) if a guilty verdict is returned to consider facts in aggravation and mitigation as they relate to punishment (§ 565.006(2)), and (3) provides a system of mandatory review (§ 565.014) that guards against, among other things, a sentence imposed "under the influence of passion, prejudice or any other arbitrary factor." (§ 565.014.3(1)). This is not a deprivation of due process, but an extension to a high order of the process due the accused. The subsequent jury will decide the issues anew and it is their responsibility to determine guilt and assess the punishment upon conviction (§ 565.006.2). Further, if on appeal reversal occurs "because of error only in the presentencing hearing, the new trial . . . shall apply only to the issue of punishment." § 565.006(3). There is no suggestion in this language that on such new trial the range of punishment is restricted to life imprisonment only. To the contrary, the choice of punishment is the principal issue to be decided in such a new trial.

Respondent next contends the possibility of a harsher sentence on retrial would unconstitutionally chill defendant's rights of appeal. We do not agree. *United States* v. *Jackson*, 390 U.S. 570 (1968), cited by respondent as authority, involved a federal anti-kidnapping statute

which allowed only the imposition of the death penalty following a jury trial. See 18 U.S.C. § 1201(a) (amended 1972). That statute was held to unconstitutionally deter the exercise of a defendant's fifth and sixth amendment rights to insist upon his innocence and demand a trial by jury. 390 U.S. at 581-583. Unlike the federal statute which singled for punishment by death that class of defendants who sought jury trials, the Missouri capital murder statutes draw no such invidious distinction.

Recent authority demonstrates that *Jackson* should be limited to statutes of the type which on their face penalize the assertion of constitutional rights. In *Brady* v. *United States*, 397 U.S. 742 (1970) and *North Carolina* v. *Alford*, 400 U.S. 25 (1970), defendants entered pleas of guilty to avoid the possibility of the imposition of capital punishment by a jury. The United States Supreme Court held that the fact a plea was entered to avoid the imposition of the death penalty by a jury did not *ipso facto* render the plea involuntary. *Brady* v. *United States*, 397 U.S. 742, 751 (1970; *North Carolina* v. *Alford*, 400 U.S. 25, 31 (1970). If the threat of the death penalty does not impermissibly coerce guilty pleas and encourage waiver of the plethora of rights guaranteed in a criminal trial under the fourth, fifth, sixth and fourteenth amendments, we do not believe the possibility of capital punishment unconstitutionally chills a defendant's right to appeal. This view is supported by that expressed in *Chaffin* v. *Stynchcombe*, *supra*, at 35 where it is stated: "The choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may in fact be 'difficult,' does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction."

Respondent next contends that § 565.008, RSMo 1978, is unconstitutional because the death penalty permitted therein constitutes cruel and unusual punishment violative of the eighth amendment of the United States constitution and art. I, § 21 of the Constitution of the State

of Missouri. This contention, first raised in defendant's Motion to Strike was renewed in respondent's brief before this Court with this language, "the death penalty, . . . is in all circumstances, a cruel and unusual punishment under both Federal and State constitutional provisions . . ." Respondent is quite mistaken, the death penalty is not per se violative of the eighth amendment. See *Gregg* v. *Georgia*, 428 U.S. 153, 187 (1976). Further, because the statutory procedures for imposition of the death penalty in Missouri are virtually identical to those contained in the Georgia statute challenged in *Gregg* no serious question remains as to their validity under the federal constitution. See *Gregg* v. *Georgia*, 428 U.S. 153, 196-207. *Lockett* v. *Ohio*, 438 U.S. 586, 604-605 (1978).

Thus we need examine only for the validity of § 565-.008, RSMo 1978, under art. I, § 21 of the Missouri Constitution.[8] The ultimate question is whether the punishment is disproportionate to the crime for which imposed. *State* v. *Agee*, 474 S.W.2d 817, 822 (Mo. 1971); *State* v. *Brownridge*, 353 S.W.2d 715, 718 (Mo. 1962). In this connection it has been held that a punishment is not cruel simply because it is severe. *Id. State* v. *Stubblefield*, 157 Mo. 360, 58 S.W. 337, 339 (Mo. 1900). When considering the constitutionality of a punishment statute enacted by our legislature, we presume its validity and those who seek to invalidate it bear a heavy burden of demonstrating that it is either barbarous or excessive. *Gregg* v. *Georgia*, *supra*, at 175 (1975); See *State* v. *Mitchell*, 563 S.W.2d 18, 26 (Mo. banc 1978).

We are mindful that the legislature necessarily considered those who have fallen victim to violent crime within our society. Their lives have been taken without notice and no rigorous procedural safeguards protected them from premeditated attack and death. No crime is more disruptive of peace and order or so violative of the

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[8] Art. I, § 21, Mo. Const. provides: "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

rights of the individual as murder. The spread of violent crime threatens the basic fabric of our Republic and surely all right thinking persons recognize that physical security of its members is among the first objects of an organized society. We cannot say that the death penalty is cruel and unusual punishment for those who unlawfully, willfully, knowingly, deliberately, and with premeditation kill another human being. This view finds wide support in the legislative enactments of sister states, as forty jurisdictions attach a penalty of death to certain categories of murder.

Given the extreme nature of the crime of murder, as well as the fact that the overwhelming majority of American jurisdictions allow imposition of capital punishment in specific instances, we will not substitute our judgment for that of our duly elected legislature in this question of policy. We hold § 565.008, RSMo 1978 does not prescribe cruel and unusual punishment in violation of art. I, § 21 of the Missouri Constitution.

It is next asserted that the death penalty may not be invoked at Bullington's second trial because § 565.008.2 (7), RSMo 1978, which provides one of the two aggravating circumstances the state seeks to prove at retrial, is unconstitutionally vague and overbroad in violation of the fourteenth amendment.[9] The United States Supreme Court, confronted by a similar argument in *Gregg* v. *Georgia*, 428 U.S. 153, 201 (1976), as to a Georgia statute (Ga. Code Ann. § 27-2534.1(b) (7)) with provisions essentially the same as ours, concluded that while it was arguable any murder involves "depravity," the language need not be construed in such a broad fashion. Hence this statutory aggravating circumstance was not found so wanting in precision that it rendered the capital sentencing procedure capable of arbitrary and capricious

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[9] Section 565.008.2(7) provides: "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."

decision violative of the eighth amendment. We see no reason to find that our almost identical statutory provision violates the fourteenth amendment particularly when the statute and its application is subject to mandatory review by the Missouri Supreme Court in all capital cases.

Respondent's final claim is that § 565.014.3(3), RSMo 1978, forbids the prosecution from seeking the death penalty at Bullington's second trial. That statute mandates proportionality review by this Court and that we determine in each case the excessiveness vel non of the death penalty's imposition.[10] We reject the contention that when a jury in the first trial of a capital murder case imposes a life sentence, assessment of capital punishment by any subsequent jury is invariably excessive. Such argument is little more than a variant of the double jeopardy argument dealt with earlier in this opinion, but respondent, pressing the contention, relies in the main on *Ward* v. *State*, 239 Ga. 205, 236 S.E.2d 365 (Ga. 1977). *Ward* is distinguishable from the case at bar in that the evidence had been presented at the subsequent proceeding and that evidence "was essentially the same" as that presented at the first trial where the jury did not recommend a sentence of death. *Id.* at 366. No evidence has been adduced in the pending retrial of this cause and we will not indulge the speculation urged as to the State's or defendant's evidence at a future trial, this notwithstanding the argument that the "notice" contains the same general averments as the earlier "notice" and despite relator's statements in oral argument that the state in-

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[10] Section 565.014.3 provides that in the review of all cases in which capital punishment is imposed this Court shall determine: ". . . (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstances as enumerated in section 565.012, and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

tended to present the same evidence at Bullington's retrial. The evidence finally adduced depends upon the witnesses not relator's expressed intention. Any rule or decisional pronouncement foreclosing on retrial additional proof in *mitigation or aggravation* within the scope of the notice, is quite unacceptable and we decline respondent's invitation to invoke such a rule as to a single phase of the proof, i.e., *aggravation.* More importantly we decline to follow the Georgia court in the construction of Missouri's death penalty statutes. *Ward* held that once a jury in a capital case finds life imprisonment, a jury sentence of death in any subsequent trial "is obviously disproportionate." *Id.* at 368. We are not persuaded to this point of view for a number of reasons. As noted above, not only may the proof vary in the second proceeding, but the jury which deemed a life sentence appropriate may well have been aberrant. It cannot be said that the findings of the first improper jury sound with finality as to aggravation or mitigation as our instructions explicitly allow the juror's individual values to be considered in the capital sentencing process. See MAI-CR 15.46. Also we have no record of the evidence from the first presentence hearing and cannot say what error may have occurred other than the fact the jury selection process in Jackson County was constitutionally infirm. Further, if such record were before us the fact remains it would be impossible to predetermine the evidence emerging in the new trial and we consider it improper to predecide the result that should flow from the proof. Finally, if defendant's (respondent's) argument were accepted that the first jury's decision on punishment binds any later jury, the argument could be made that if the first jury decided on death as an appropriate sentence

the second jury's consideration would be limited to only that punishment. Needless to say defendant would promptly abjure that result.

The rule is made absolute.

ALBERT L. RENDLEN
Judge

Morgan and Higgins, JJ., concur;
Donnelly, J., concurs in separate concurring opinion filed; Welliver, J., concurs in result; Bardgett, C.J., dissents in separate dissenting opinion filed; Seiler, J., dissents in separate dissenting opinion filed.

[SEAL]

SUPREME COURT OF MISSOURI

EN BANC

No. 61499

STATE EX REL. GEORGE R. WESTFALL, RELATOR

vs.

HONORABLE DONALD L. MASON, Judge,
16th Judicial Circuit, RESPONDENT

CONCURRING OPINION—Filed Feb. 11, 1980

I would make a few observations on the issue of *double jeopardy.*

My Brother Seiler would, for constitutional purposes, and in a situation calling for a bifurcated proceeding, relate the prohibition against double jeopardy not only to the *offense* of capital murder of which Bullington was convicted but also to the *punishment* imposed for the offense of which he was convicted. He would reason that Bullington can be retried for the *offense* of which he was originally convicted because he *waived* the double jeopardy protection by attacking the validity of his conviction on *Duren* grounds—but Bullington cannot be subjected to a *punishment* greater than that assessed at his first trial because there was an implied acquittal of punishment by death.

In order to embrace such a position, capital murder must be treated as two offenses (capital murder where death may be imposed and capital murder where imprisonment for at least fifty years may be imposed) *or* it must be assumed that there are two "degrees" of capital murder (one sufficient to impose death and one not).

In my view, the discretion given by statute to assess punishment at less than death does not support either

proposition. I find nothing in either constitution which would require that we construe capital murder as constituting two offenses or as being divided into degrees. The jury finding in October 1978 that Bullington should be sentenced to life imprisonment without probation or parole for not less than fifty years was not a determination that any element of the offense of capital murder is lacking. The constraints of double jeopardy are not involved here.

I would also make a few observations about imposition of the *death penalty* under § 565.008, RSMo 1978.

Article I, § 21 of the Constitution of Missouri provides that "excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishment inflicted.*" (Emphasis supplied.)

In my view, the taking of a life for a life is not always cruel. History teaches us that it is not unusual.

The taking of the life of a human being *by another human being* "unlawfully, willfully, knowingly, deliberately, and with premeditation" (§ 565.001, RSMo 1978) cannot be tolerated by organized society. Our Constitution promises that the "natural right to life" of all persons will be protected. Mo. Const. art. I, § 2.

The ultimate question is: May that protection be effected by the imposition of capital punishment? The arguments which swirl about us as to the validity of suggested justifications for the imposition of death as punishment (e.g., retribution and deterrence) make for fascinating reading but miss the mark. *See* S. Donnelly, *A Theory of Justice, Judicial Methodology, and the Constitutionality of Capital Punishment: Rawls, Dworkin, and a Theory of Criminal Responsibility*, 29 Syracuse L. Rev. 1109 (1978); and R. Gardner, *Capital Punishment: The Philosophers and the Court*, 29 Syracuse L. Rev. 1175 (1978).

However, it is my personal belief that an organized society that takes a life for a life as a part of its public policy is mistaken in its belief that it is promoting its

own basic premise "that all government * * * is instituted solely for the good of the whole." Mo. Const. art. I, § 1.

Although I am compelled to concur, it is my view that taking the life a human being "willfully, knowingly, deliberately, and with premeditation" (albeit "lawfully") *by an organized society* is socially amoral. I think it will be self-destructive and that inevitably it will lower the quality of society and will be detrimental, if not devastating, to "the good of the whole." In warfare a fragile line sometimes exists between amoral killing and killing regarded as moral by world society. Here I think the line is not fragile but plain. Establishment of a studied public policy by which a whole community intentionally crosses the line into what I view as amoral killing, even though legal, represents a risk too great to itself for that community to assume.

In my view, banishment for fifty years (§ 565.008, RSMo 1978), with no concern for the probable fiction of rehabilitation, is an acceptable alternative. It would effectually excise the transgressor from our society without debilitating our society's collective concept of decency.

However, I have no authority to impose such views on the people of Missouri. To borrow from Mr. Justice Frankfurter: "As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting).

I have spoken of the death penalty in terms of *public policy*. It should be noted that constitutional concerns must be addressed by this Court, under authority of § 565.014, RSMo 1978, in each case where death is imposed as punishment.

I concur.

ROBERT T. DONNELLY
Judge

[SEAL]

SUPREME COURT OF MISSOURI

EN BANC

No. 61499

STATE EX REL. GEORGE R. WESTFALL, RELATOR

vs.

HONORABLE DONALD L. MASON,
Judge, 16th Judicial Circuit, RESPONDENT

DISSENTING OPINION—Filed Feb. 11, 1980

I dissent and concur in the dissenting opinion of Seiler, J. However, I wish to address the nature of our new capital-murder statute because I believe it differs in a substantive way from former murder statutes which permitted the death penalty as one of the punishments and thereby calls for different treatment by this Court.

Capital murder is not treated as two offenses. Nor do I think the dissent of Seiler, J., suggests that it is two offenses.

The old first-degree-murder statute, § 559.010, RSMo 1969, repealed Laws of Mo. 1975, p. 408, § A (hereinafter "old capital murder law") provided:

> 559.010. Murder in the first degree
>
> Every murder which shall be committed by means of poison, or by lying in wait, or by *any* other *kind of willful, deliberate and premeditated killing*, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, *shall be deemed murder in the first degree.* (Emphasis added.)

The punishment was to be arrived at and assessed in accordance with § 559.030, RSMo 1969, repealed Laws of Mo. 1975, p. 408, § A, which provided:

> 559.030. Trials for murder, verdict and punishment
>
> Upon the trial of an indictment for murder in the first degree, the jury must inquire, and by their verdict ascertain, under the instructions of the court, whether the defendant be guilty of murder in the first or second degree; and *persons convicted of murder in the first degree shall suffer death, or be punished by imprisonment in the penitentiary during their natural lives*; those convicted of murder in the second degree shall be punished by imprisonment in the penitentiary not less than ten years. (Emphasis added.)

The new capital-murder statute essentially copied the mental elements of the old capital-murder law, italicized supra, and designated the offense "capital murder" as follows:

> 565.001. Capital murder defined.—Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder. (L. 1977 H.B. 90 § 1) Effective 5-26-77 [1]

Elaborate procedures now appear in our laws whenever the death penalty is a possible punishment. §§ 565.006, 565.008, 565.012, 565.014, 565.016, RSMo 1978. The penalty section itself is § 565.008.1, RSMo 1978, and provides:

> 565.008. Death penalty, when imposed—life imprisonment, when imposed—minimum of fifty years

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[1] That part of repealed § 559.010, referring to homicides committed in the course of certain felonies "felony murder", became first-degree murder, § 565.003, RSMo 1978, punishable by life imprisonment, § 565.008.2, RSMo 1978.

> to be served, when—first and second degree murder, penalties for.—1. Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

One must carefully read the numerous provisions relating to the procedures and required findings provided in the cited statutes to fully appreciate the qualitative difference between our old capital-murder law and the present one. The differences are pointed up however by the case of State v. Tiedt, 229 S.W.2d 582 (Mo. banc 1950), a death-penalty case under our old law, when it is compared with the specific requirements of §§ 565.012.4 and 565.012.5, RSMo 1978.

In *Tiedt*, a jury found Tiedt guilty of "old" first-degree murder and assessed punishment at death. The only other penalty available was life imprisonment, § 559.030, *supra*, repealed. On appeal the defendant contended the trial court erred in refusing a certain instruction he tendered which would have told the jury that "'. . . the law relative to the right to receive the benefit of the doubt as to the severity of punishment'; that, if defendant was guilty of murder in the first degree, 'he was entitled to the benefit of a reasonable doubt * * * as to whether he should be given the death penalty or given a life sentence'; and that the 'same benefit of reasonable doubt should apply in fixing punishment as well as in determining whether any punishment should be assessed.'" *Id.* 585-6.

This Court held at 586: "The instruction was properly refused. If, under the evidence and instructions of the

court, the jury found defendant guilty of murder in the first degree, it was for the jury to fix the punishment. *The matter of punishment, within the limits fixed by the statute, was solely within the discretion of the jury under all of the facts and circumstances in evidence.* Secs. 4378, 4092, R.S. 1939, Mo.R.S.A.; State v. Bevins, 328 Mo. 1046, 43 S.W.2d 432, 434; State v. Creighton, 330 Mo. 1176, 52 S.W.2d 556, 563; Ex parte Dusenberry, 97 Mo. 504, 11 S.W. 217. *No question of reasonable doubt was involved in the matter of assessing the punishment.* People v. Krauser, 315 Ill. 485, 146 N.E. 593, 605." (Emphasis added.)

The concept set forth in *Tiedt* that the death penalty could be validly imposed without any standards or directions was again approved in State v. Coleman, 460 S.W. 2d 719 (Mo. banc 1970). But it was precisely this "unbridled discretion" which caused the Supreme Court of the United States to declare this procedure unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972). For a more detailed discussion of what was required by *Furman* and its progeny, see State v. Duren, 547 S.W.2d 476 (Mo. banc 1977), where this Court held unconstitutional a mandatory death penalty for capital murder.

The Missouri General Assembly subsequently adopted the present law. The essential and substantive difference is that, at least where the death penalty is a possibility, the jury first decides whether the defendant is guilty or not guilty of capital murder. Of course the state has the burden of proof and the defendant has the benefit of reasonable doubt. If the defendant is found guilty of capital murder, then the second stage of the trial takes place. Sec. 565.006, RSMo 1978. This is completely new in our criminal jurisprudence. Sections 565.012.4 and 565.012.5, RSMo 1978, require that before a death penalty can be assessed the jury must again be properly instructed, must find *beyond a reasonable doubt* that at least one of the statutory aggravating circumstances exist, and must designate its finding in writing.

As pointed out in the dissent of Seiler, J., the instructions make it clear that the law requires that aggravating circumstances must be based on evidence and *that the burden of proof is upon the state to prove the same beyond a reasonable doubt.* MAI-CR 2d 15.40 and MAI-CR 2d 15.42.

The law requires affirmative findings beyond a reasonable doubt stated in a special verdict from before a death penalty can be imposed by the jury. The death penalty cannot result from a negative finding. The effect of our capital-murder law is that capital murder, *without more*, is punishable by life imprisonment without parole for fifty years. Capital murder *plus* an additional verdict of aggravating circumstances authorizes but even then does not compel the death penalty.

In view of the manner in which the legislature has dealt with the punishment for capital murder, which requires a separate finding and verdict by the jury if the death penalty is to be imposed, and because this is a new and unique procedure, we ought not try to fit this into any traditional molds of lesser-included offenses or degrees of homicide. The legislature has already done that by making significant and substantive differences in the penalty section of the capital-murder statutes. They have treated the death penalty as a punishment which is unique unto itself and not comparable to any term of imprisonment.

Under our capital-murder statutes, the crime may be punished by death if, and only if, the state carries its burden of proving beyond a reasonable doubt an element which is not necessarily part of the definition of capital murder. The jury does not decide this additional element when determining whether the defendant is guilty of capital murder. That additional element is the presence of a "statutory aggravating circumstance" which the jury may consider only *after* it finds the defendant guilty of capital murder and then only in those cases where the death penalty is sought. Thus what we have in

Missouri is (1) capital murder punishable only by life imprisonment without parole for fifty years, and (2) capital murder plus at least one aggravating circumstance which may be but is not required to be punishable by death.

In this case the jury has already acquitted the defendant of whatever was necessary to impose the death sentence. This was done in a separate trial or hearing devoted only to that matter and in which the state had the burden of proof and the defendant had the benefit of reasonable doubt. Although it does not fit nicely into traditional concepts, it is clear that the jury has acquitted on the death penalty and the defendant is therefore not subject to retrial on that issue.

In short, the new capital-murder statutes allow a defendant to be placed in jeopardy of conviction of capital murder and then, *after* conviction, allow a defendant to be placed in additional and separate jeopardy of the death penalty. And this defendant, after being placed in such additional and separate jeopardy of being put to death, was acquitted of that death penalty.

I therefore dissent and would quash the preliminary rule in prohibition.

JOHN E. BADGETT
Chief Justice

This Opinion Is the Modified Dissenting Opinion
Filed on March 11, 1980

[SEAL]

SUPREME COURT OF MISSOURI

EN BANC

No. 61499

STATE EX REL. GEORGE R. WESTFALL, RELATOR

v.

HON. DONALD L. MASON, Judge, 16th Judicial Circuit,
RESPONDENT

DISSENTING OPINION—Filed Mar. 11, 1980

I respectfully dissent. The case at bar presents a defendant who was convicted of capital murder in a bifurcated trial wherein the jury first decides his guilt and, after finding him guilty, in a second stage decides whether the death sentence will be imposed. In this second stage, pursuant to statute, the state presented evidence of aggravating circumstances and the defendant presented evidence of mitigating circumstances for the jury's consideration in determining whether to impose the death sentence. The jury determined a single issue, whether the facts marshalled by the state affirmatively justified the imposition of the death sentence on Robert Bullington.[1] The jury found against the state, deciding that

[1] The Missouri Approved Criminal Instruction submitted to the jury for this finding, MAI-CR 15.40 "Guilty of Capital Murder: Statutory Aggravating Circumstance—Finding Required for Death Penalty," with the two aggravating circumstances proffered by the prosecuting attorney would have read as follows:

[Footnote continued on p. 108]

none of the possibilities presented warranted the death sentence. The state now demands that it again be permitted to present the same facts to a second jury with the hope that the new jury will decide to execute the defendant. Three times during his oral argument before this court, the prosecuting attorney conceded that the state would offer the same evidence in support of its demand that Robert Bullington be sentenced to death.[2] The principal opinion will permit the state to relitigate a jury's determination that the death sentence is inappropriate whenever a defendant sentenced to life imprisonment succeeds in overturning an unconstitutional capital conviction.

The principal opinion does not distinguish the very different cases presented by single stage trials and the

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[1] [Continued]

"In determining the punishment to be assessed (under Count ——) against the defendant for the murder of [*name of victim*], you must first unanimously determine

"Whether the defendant has a substantial history of serious assaultive convictions.

"Whether the murder of [*name of victim*] involved torture or depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.

"You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.

"Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence."

[2] The statement in the principal opinion that it is speculative as to what the state's evidence on aggravation will be on retrial is contradicted by the statements of the prosecuting attorney who will again try the case for the state. There is no reason why we should doubt the prosecutor's knowledge of his case.

bifurcated trial required for the imposition of the death penalty. By not distinguishing the cases, the analysis overlooks the unanimous authority denying the state a second jury determination as to the death penalty once a jury singularly and affirmatively finds that the defendant is not to be put to death. The cases cited as authority in the principal opinion go back more than fifty years, long prior to establishment of present day standards and requirements which make a death penalty case unique. There has never been anything like it before. The cases relied on by the principal opinion all involve single stage proceedings and do not encompass or address in any respect the issues and complexity presented by the two separate trial stages required by the more recent United States Supreme Court cases for conviction *and* sentencing of the capital murder offense. The only cases directly in point, not all of which are discussed by the principal opinion, reach an opposite result.

I

In 1976, the United States Supreme Court upheld the constitutionality of Georgia's bifurated trial procedure for capital offenses in Gregg v. Georgia, 428 U.S. 153 (1976). In a companion case, Woodson v. North Carolina, 428 U.S. 280 (1976), the Supreme Court held unconstitutional North Carolina's mandatory death penalty statute for first-degree murder. In *Woodson*, the plurality opinion stated that the Constitution requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." 428 U.S. at 303.

In 1977, the Missouri legislature enacted a bifurcated trial procedure for capital offenses, now §§ 565.008 and 565.012, RSMo 1978, patterned on the Georgia statute upheld in *Gregg*. The Georgia statute, Ga. Code §§ 27-2503 and 27-2534.1 (1975), provides for a trial in two

stages, one for a determination of guilt, and a second for a determination as to whether the degree of the convicted defendant's guilt justifies his execution. Under both statutes, a jury that convicts a defendant of capital murder in the first stage must then in the second stage hear new evidence and determine whether the defendant's guilt will be punished by a life sentence or whether his guilt is such that he should be put to death.

In the instant case, the principal opinion apparently finds that this determination by the jury in the second stage of trial is merely assigning punishment within the range provided by statute and not a finding of what is required to justify the death penalty. But in *Woodson*, the Supreme Court rejected this view: "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. *Death, in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two.*" 428 U.S. at 305 (emphasis added).

The principal opinion makes much of the fact that there is but one crime of capital murder and refuses to acknowledge that the statutory framework treats capital murder markedly different than any other crime. It is true that § 565.001, RSMo 1978, defines capital murder. But taken alone it is incomplete. Without a penalty being prescribed, it is no more than an abstract declaration of law. A killing may be unlawful, willful, knowing, deliberate and premeditated, yet that is not all capital murder encompasses. In addition to guilt, there must also be found by the jury, beyond a reasonable doubt, aggravating circumstances which the jury must designate in writing in its verdict. Capital murder is meaningless without the punishment. There is no such thing as a conviction of capital murder per se without more. It has to be either capital murder with death or capital murder with life imprisonment, without probation for fifty years, etc. This does not "rend" the crime of capi-

tal murder. Rather, it recognizes what we all know to be the fact.

The statutes dealing with the crime provide for a unique two stage proceeding and require that the jury must affirmatively find beyond a reasonable doubt additional aggravating circumstances before it can impose the death penalty. By requiring that the additional element of aggravating circumstances be proven beyond a reasonable doubt for the imposition of the death penalty, the statutory framework effectively establishes the crime of aggravated capital murder punishable by death and the crime of capital murder punishable by life imprisonment without the possibility of probation or parole for fifty years. The legislature had no choice but to enact two degrees of punishment for the crime of capital murder. Had the legislature separated the degrees into two separate offenses, with one of a higher degree punishable only by death, the statute would have been unconstitutional under *Woodson* as a mandatory death penalty statute.

Accordingly, this case presents much more than the potential for enhanced punishment upon retrial under a single-verdict procedure. The issue in this case is whether, under the bifurcated trial procedure for capital cases, the state can ignore the jury's implicit acquittal of the defendant of what is required to justify imposition of the death penalty and on retrial once again ask a jury to find what it considered and declined to find in the first trial.[3]

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[3] Exen a cursory glance at the Missouri Approved Criminal Instructions for the second stage in capital murder trials, after a jury has already convicted the defendant, indicates that a jury determination to impose a life sentence is an implied acquittal of the aggravated capital murder which would justify the imposition of the death penalty. The "Supplemental Notes on Use Applicable to the 15.00 Series of MAI-CR" (for homicides committed after May 25, 1977) requires the reading of: MAI-CR 15.30, 15.32 and 15.34 in the opening of the second stage before the presentation

The principal opinion would smudge the question of what issue the jury decided in the first trial when it gave defendant life imprisonment instead of death. The principal opinion speculates that perhaps the jury "intuitively" found the mitigating circumstances outweighed the aggravating circumstances or that perhaps the jury's "predilections as to mercy" explain the verdict or that perhaps it was in response to "a defendant's plea for mercy rather than finding no aggravation." There is no way we can know what may have subjectively impelled the jury to reject death and agree on life imprisonment. What we do know is that the jury has resolved the issue under instructions which, as pointed out below, presented it with a single, narrow issue for decision. The only "single rationally conceivable issue in dispute before the jury", Ashe v. Swenson, 397 U.S. 436, 445 (1969), after guilt was decided, was whether this defendant was to receive death or life imprisonment under the terms and conditions of the instructions given.

MAI-CR 15.30 instructs the jury that "at this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for the offense."

MAI-CR 15.32 instructs the jury it is to go to the jury room, "deliberate and arrive at your verdict fixing the punishment to be imposed upon the defendant."

MAI-CR 15.36 instructs the jury "it is your duty and yours alone to decide upon the punishment to be imposed upon the defendant . . ."

MAI-CR 15.40 concludes by instructing the jury, "Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that the foregoing circumstance exists and that it is an aggravating circum-

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of evidence; MAI-CR 15.36 after the presentation of evidence and before argument; and MAI-CR 15.38, 15.40, 15.42, 15.44, 15.46 and 15.48 after argument. Finally, a special verdict form, MAI-CR 15.56.2, is presented to the jury for its determination of the question.

stance,[4] you must return a verdict fixing the punishment of the defendant at imprisonment for life . . ."

The same is true with respect to MAI-CR 15.42, which requires a verdict of life imprisonment if the jury does not find the aggravating circumstances are sufficient to warrant death.

MAI-CR 15.44 requires the jury to return a verdict of life imprisonment if the mitigating circumstances outweigh the aggravating circumstances.

Finally, MAI-CR 15.46 tells the jury that even if the mitigating circumstances do not outweigh the aggravating circumstances, the jury is not compelled to arrive at a death verdict.

Therefore, the verdict of life imprisonment in the first trial had to mean one of four things:

1. The jury did not find aggravating circumstances, or
2. It did not find the aggravating circumstances were sufficient to warrant death, or
3. The mitigating circumstances outweighed the aggravating circumstances, or
4. Even if they did not, the aggravating circumstances were not sufficient.

To use the language of *Ashe, supra*, this jury, under the instructions, could not have grounded its verdict as to life or death upon an issue other than that which the defendant seeks to foreclose from consideration—namely, that under the facts presented by the state, which the prosecution says will be the same on retrial, none of the possibilities warranting the death sentence existed.

This case raises squarely the issues of the rule of collateral estoppel embodied in the fifth amendment guarantee against double jeopardy as enunciated in Ashe v. Swenson, *supra*. In *Ashe*, the Supreme Court held that

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[4] The instruction can be reworded slightly to cover the situation where there are several aggravating circumstances submitted, at least one of which must be found.

the applicability of the rule in criminal cases " 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' " 397 U.S. at 444 (citing Sealfron v. United States, 332 U.S. 575, 579). Viewed with an eye to all the circumstances of the proceedings, the case at bar presents a prior jury determination of "the single rationally conceivable issue in dispute", whether the defendant's guilt was such as to justify the death penalty. *See Ashe, Id.* at 445. Because the jury in the second stage of the trial found that the aggravating circumstances were either not present or were insufficient, the state should not be given a second chance to present the question to another jury.

II

Three state supreme courts have addressed the precise issue before this court, each of which held impermissible the state's attempt to relitigate at a second trial whether the convicted defendant's guilt justified the death penalty after the first jury decided the death penalty was not justified. Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977); Commonwealth v. Littlejohn, 433 Pa. 336, 250 A.2d 811 (1969); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

In Ward v. State, *supra*, the Georgia Supreme Court found the imposition of the death penalty in the second trial unlawfully disproportionate to the life sentence imposed by the first jury. The court found the disparity in sentences impermissibly disproportionate under Ga. Code § 27-2537(c)(3)(1975), which is word for word the same language contained in Missouri's statute providing standards for review of death penalty cases, § 565.014.3(3), RSMo 1978, as well as under the United States Supreme Court's standards in Gregg v. Georgia, *supra*.[5] The Georgia court concluded:

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[5] In Gregg v. Georgia, 428 U.S. 153, 187 (1976), the Supreme Court held, among other things, that the imposition of the death

"The same defendant was tried previously on the same charges and the jury imposed a life sentence. Therefore the death sentence in the case under review is obviously disproportionate to the life sentence previously imposed against the same defendant in the same case. Accordingly, the law requires us to vacate the death sentence and direct the imposition of a life sentence. . . . To do otherwise would be incongruous and contrary to the clear mandate of the law. For as was said by the United States Supreme Court in Gregg, '[t]he provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by action of an aberrant jury.' *Gregg*, supra, 428 U.S. at 206, 96 S.Ct. at 2940."

236 S.E.2d at 368. Because the Georgia and Missouri statutes providing standards for review of death penalty cases are almost identical, this case is certainly persuasive authority for denying the state on retrial a second chance to litigate its demand that the defendant be put to death once the first jury decides the issue against the state.

In the case at bar, the principal opinion attempts to distinguish the *Ward* case "in that the evidence had been presented at the subsequent proceeding and that evidence 'was essentially the same' as that presented at the first trial where the jury did not recommend a sentence of death." But as noted above, the prosecuting attorney in this case conceded during oral argument that the state's evidence in a second trial would be the same as that presented at the first trial. The principal opinion also says that the fact the "notice" required by

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penalty cannot be disproportionate in relation to the crime for which it is imposed.

§ 565.006-2 as given in the instant case contains the same general averments of aggravation as the earlier notice should not be held to foreclose additional proof within the scope of the notice. But that is not defendant's contention. The prosecuting attorney, himself, has told us that the state's evidence in the second trial will be the same as that presented at the first trial. It is not a matter of what the scope of the notice allows. The fact is that the prosecutor, who is in a better position to know than we are, has conceded the evidence will be the same. This makes the cases virtually identical and the result reached in *Ward* all the more persuasive.

In Commonwealth v. Littlejohn, *supra*, the Pennsylvania Supreme Court held that the constitutional provisions relating to due process, equal protection and double jeopardy precluded the Commonwealth from seeking the death penalty in a second bifurcated trial against a defendant sentenced to life imprisonment in the first trial. The court found that exposing a defendant who appeals from a life sentence to a second possibility of receiving the death sentence at a new trial violates due process by conditioning the right of appeal.

> "The prisoner must decide whether to abandon his constitutional right to a fair trial and serve out his prison term under an invalid or unchallenged sentence, or exercise his statutory right to appeal in order to achieve his constitutional right to a fair trial, at the risk that his second trial might result in the imposition of the death penalty. This makes the price of appeal from an erroneous judgment in a first degree murder case the risk of a man's life. . . ."

250 A.2d at 813-14. The court found that "this choice not only shocks the conscience and offends our sense of justice, but also rises to an unconstitutional condition"

under United States v. Jackson, 390 U.S. 570 (1968).[6] *Id.* at 814.

The Pennsylvania court also found a violation of equal protection on the ground that of all defendants sentenced to life imprisonment, only those who appealed their sentences would be singled out for the possible imposition of the death penalty:

> "It is our view that the equal protection clause of the fourteenth amendment also prohibits the Commonwealth from imposing the threat of the death penalty on those who have been convicted of first degree murder and sentenced to life imprisonment. . . . [I]nstead of choosing a group for sentence review on the basis of some factor which bears a rational connection with the purpose of review, this system employs a completely irrational standard for choosing those whose sentences may be changed.
>
> "Further, . . . if the Commonwealth's purpose is to eliminate frivolous appeals, employing the deterrent of an increased sentence does not represent a rational standard. . . . The device of the threat of the death penalty does not bear *any* reasonable relation to the frivolousness or merits of the appeal."

250 A.2d at 815.

In *Littlejohn*, the Pennsylvania court also found a violation of the double jeopardy clause under the principle enunciated in Green v. United States, 355 U.S. 184 (1957). In *Green*, the United States Supreme Court held that a defendant, who had been convicted of second degree murder and successfully had that conviction reversed, could not be tried again for first degree murder.

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[6] In United States v. Jackson, 390 U.S. 570 (1968), the Supreme Court held invalid as an unconstitutional condition a provision in the Federal Kidnapping Act, 18 U.S.C. § 1201(a), which provided that a defendant who chose to be tried by a jury was subject to the death penalty, but a defendant who waived his right to a jury trial gained immunity from the death sentence.

The court reasoned that the first jury, by returning a verdict of second degree murder, had impliedly acquitted the defendant of the first degree charge. In applying *Green* to the bifurcated trial and circumstances presented in *Littlejohn* (the circumstances presented this court in the case at bar), the Pennsylvania Supreme Court held that the double jeopardy clause prevented a prosecution for the higher punishment, namely, death rather than imprisonment, once the defendant has been convicted of and received the less severe punishment. *Id.* at 816.

In People v. Henderson, *supra*, the California Supreme Court held that in a bifurcated trial the prohibition against double jeopardy precluded the imposition of a death sentence upon a defendant after the reversal of the first judgment sentencing him to life imprisonment. Mr. Justice Traynor, writing for the court, reasoned that since Green v. United States, *supra*, established that a reversed conviction of a lesser degree of a crime precludes conviction of a higher degree on retrial, "[i]t is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the legislature divides a crime into different punishments or allows the court or jury to fix different punishments for the same crime." 386 P.2d at 686. The California court also found that the death penalty threat imposed unreasonable conditions on the right to appeal:

> "A defendant's right to appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal."

Id.

The principal opinion does not discuss the *Littlejohn* and *Henderson* cases.

In the case at bar, the principal opinion relies on Gully v. Kunzman, 592 F.2d 283 (6th Cir.) *cert. denied*, 99 S.Ct. 2850 (1979) as authority for its statement that the fifth amendment does not forbid imposition of the death penalty on retrial of defendant for an offense upon which he was originally sentenced to life. But the *Gully* decision did *not* involve a bifurcated trial with a second stage for determining whether the degree of guilt justified the death penalty:

> "The new death penalty statute was not employed at petitioner's first trial. Indeed, *the option of sentencing petitioners to death was not even submitted to the sentencing authority at the trial.* Accordingly, the fact that petitioners received only a life sentence after the first trial cannot be interpreted as 'an implicit acquittal' of the 'greater' offense created by the new death penalty law. *See* Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)."

592 F.2d at 289 (emphasis added). Because *Gully* did not involve a specific jury finding that the defendant's degree of guilt did not justify the imposition of the death penalty, the *Gully* case is clearly distinguishable.[7] In

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[7] For the same reason, the principal opinion places undue reliance on Stroud v. United States, 251 U.S. 15 (1919) and Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (a robbery conviction that did not involve the imposition of the death penalty, both cases involving only single stage trials).

The principal opinion contends that *Chaffin*, despite the fact it involved only a single stage trial, nevertheless supports the proposition that the state may again seek the death penalty when defendant is tried before the second jury in the case before us, pointing out that *Chaffin* said that "bifurcation alone would not wipe away the fundamental differences between jury and judicial sentencing."

There was no bificurated trial in *Chaffin* and the *Chaffin* opinion does not purport to deal with the problems which are raised by the instant case, tried as it was under our system of instructions which focus the jury upon a single issue in the second stage proceedings, as discussed earlier herein.

fact, the *Gully* case actually supports the view that, in a bifurcated trial, the imposition of a life sentence by the jury in the second stage is for the purposes of double jeopardy analysis an implied acquittal of aggravated capital murder punishable by death:

> "We do not think this analysis far-fetched, since, under the new scheme, a defendant convicted of a capital offense may not be sentenced to death except upon a finding, 'beyond a reasonable doubt,' of certain statutorily-prescribed 'aggravating factors.' These 'factors' might be conceived of as elements of the 'greater' crimes of 'capital murder/armed robbery' rather than simply as guides for the exercise of the sentencing authority's discretion to fix an approximate punishment for one convicted of 'simple' willful murder and armed robbery."

Id. In any event, *Gully* is not authority for permitting the state to expose the defendant to the risk of the death penalty after a jury has implicitly acquitted him of guilt justifying the imposition of the death sentence.

As the review of the *Ward*, *Littlejohn*, *Henderson* and *Gully* cases indicates, the case at bar presents questions of due process, equal protection, and double jeopardy. I am convinced that the second exposure of this defendant to the potential of the imposition of the death penalty, after a jury in the second stage of a bifurcated trial singularly and affirmatively decided that the defendant is not to be put to death, would violate the fifth and fourteenth amendments of the United States Constitution, the due process clause of the Missouri Constitution, art. I, § 10, and § 565.014.3(3), RSMo 1978.

III

The result reached in the principal opinion infringes upon both the right to appeal and the right to a jury trial. Moreover, this result is fundamentally unfair where, as here, the necessity of the second trial is caused by the state's errors.

A

The Bill of Rights portion of the Missouri Constitution provides in art. I, § 14 "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person. . ." This section has been interpreted by this court "to protect citizens in enforcing rights recognized by law, without discrimination." Schulte v. Missionaries of LaSalette Corporation, 352 S.W.2d 636, 641 (Mo. 1961). In the case at bar, the defendant was originally convicted unconstitutionally that and he succeeded in overturning his conviction. His right to a fair trial had been denied him. The principal opinion effectively holds that this defendant, and others similarly spared the death sentence by a jury in the second stage of a capital trial, must forfeit the jury's implied acquittal of the death penalty in order to challenge an unconstitutional conviction. This result obviously discriminates against persons who attempt to enforce their rights to be free from unconstitutional convictions. This discrimination and infringement upon the right of appeal, by forcing a person unconstitutionally convicted to risk the imposition of the death sentence in order to vindicate his rights, violates Mo. Const. art. I, § 14.

B

Aside from infringing the right of appeal, the result reached under the principal opinion will chill the exercise of defendant's right to a jury determination in the second stage of trial. This result will arise when the defendant is forced to choose whether he will exercise his right to a jury trial or settle for sentencing by the trial judge to avoid the possible imposition of the death penalty upon retrial.

In North Carolina v. Pearce, 395 U.S. 711 (1969), the United States Supreme Court held that when a defendant has succeeded in obtaining a new trial, the due process clause prevents a sentencing judge from imposing a

harsher sentence on the defendant if he is convicted in the second trial, absent any identifiable misconduct by the defendant between the time of the first and second trial. The Supreme Court held:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."

395 U.S. at 725-26.

The general sentencing provisions of the new criminal code permit a defendant to request "in writing that the court assess punishment in case of a finding of guilt" by the jury. § 557.036.2, RSMo 1978. If the defendant waives jury sentencing and, therefore, is sentenced instead by the judge in the event of a finding of guilt, the judge will be bound by the holding of *North Carolina* v. *Pearce, supra.* Accordingly, a defendant given life imprisonment by the jury after a capital conviction may, if he succeeds in obtaining a new trial, limit the maxi-

mum sentence in the second trial to life imprisonment by waiving jury sentencing in the second trial.[8]

As a result of the holding in the principal opinion, a defendant who obtains a new trial after being sentenced to life imprisonment in a bifurcated capital murder trial will be forced, in the second trial, to waive his right to jury trial guaranteed under the sixth amendment, Duncan v. Louisiana, 391 U.S. 145 (1968), the Missouri Constitution, art. I, § 22(a), to avoid putting his life in jeopardy once again. Only if the defendant waives his right to a jury determination in the second stage of trial can he avoid being forced to run the gauntlet until the state succeeds in its efforts to take his life. Consequently, the result reached today erects the same framework impairing the right to a jury trial which was held unconstitutional in United States v. Jackson, *supra.*

In *Jackson,* the United States Supreme Court held unconstitutional the provision in the Federal Kidnapping Act, 18 U.S.C. § 1201(a), which provided that a defendant who chose to be tried by jury was subject to the death penalty, but a defendant who waived his right to a jury trial gained immunity from the death penalty. Like the defendant in *Jackson,* the defendant in the case at bar is subject to the death penalty if he chooses to be tried by jury in the second stage of trial, but gains immunity from the death penalty if he waives his right to jury sentencing. As in the unconstitutional framework in *Jackson,* under today's decision the defendant, if "ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." 390 U.S. at 581. But the Supreme Court found this result "needlessly chill[s] the exercise of basic constitutional rights." *Id.* at 582.

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[8] This strategy forces the defendant to run the risk, however, that if the jury in the second trial finds the defendant guilty of a non-capital offense, the jury may impose a harsher sentence than the jury would have imposed on him.

C

There is another consideration, too. It is basically unfair to permit the state, after it has failed to obtain a death sentence, and after a new trial has been awarded because of the state's errors, to keep trying the defendant over and over for the death penalty. Even where his life is at stake, the defendant cannot match the resources of the state and sooner or later the state will prevail.

IV

The principal opinion contends that if the first jury's decision on punishment binds any later jury, "the argument could be made that if the first jury decided on death as an appropriate sentence the second jury's consideration would be limited to only that punishment." While there may be surface appeal in this proposition, the argument ignores long-standing constitutional principles. In United States v. Ball, 163 U.S. 662, 671 (1896), the United States Supreme Court unequivocally stated that a "verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." And in Green v. United States, *supra*, the Supreme Court made clear that an implied verdict of acquittal of a greater offense, as when the jury convicts the defendant of a lesser offense, enjoys the same finality and insulation from review as an outright acquittal. In the case at bar, the court is presented with the jury's implied acquittal of capital murder with the death penalty, as the jury refused to find in the second stage of trial that the state's proffered aggravating circumstances justified putting the defendant to death.

The Missouri capital murder statutes require that the jury pass on whether defendant is to be found guilty of capital murder with the death penalty or capital murder with life imprisonment without eligibility for probation or parole for fifty years. Once the issue is decided in the defendant's favor, whether by an outright acquittal

as in United States v. Ball, *supra*, or by an implied acquittal as in Green v. United States, *supra*, the dispute as to the question is ended "then and there." *See* United States v. Jorn, 400 U.S. 470, 484 (1971). "[T]here is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous,' . . . the legal rulings leading to that judgment might be." Sanabria v. United States, 437 U.S. 54, 75 (1978). In *Green*, the Supreme Court flatly rejected the government's contention that the defendant "must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced . . ." 355 U.S. at 193-94.

In any event, it would not be sound for the court to decide the actual issues presented in this case on the basis of speculation as to the result we would reach in a hypothetical case. The principal opinion has postulated a nonexistent contingency—that of a case where defendant was given death—different from the facts before us, the legal questions of which nonexistent case have neither been briefed nor argued. If this anticipated issue were to arise, this court may decide the case after the issue is timely briefed and argued. I would decide the question when it arises; it is not an issue in this case.

V

Although the principal opinion states at the outset that the "principal question for our determination is whether on retrial the death penalty . . . is barred as possible punishment by constitutional or statutory consideration" [9] and concludes that the trial court would be exceeding its

[9] It is important to bear in mind that the constitutional issue referred to is not the constitutionality of the death penalty, but whether it is constitutional to subject defendant to the death penalty on retrial after the jury in the first trial had rejected the death penalty and given the defendant life imprisonment.

authority in denying the state leave to seek imposition of the death penalty on retrial and hence prohibition lies, the opinion also addresses the constitutionality of the death penalty. That point is not raised in relator's original brief in any way. Counsel for respondent in his brief predicts that the death penalty will in due course be held unconstitutional, but that they will "say no more here than enough to make the point, in order to preserve it for appeal" (obviously referring to the appeal which may come after the retrial of the capital murder case), and then argues that § 565.012.2(7), RSMo 1978, one of the statutory aggravating circumstances proffered by the state in its effort to impose the death penalty on defendant, is unduly broad and vague. Relator, then, in his reply brief "suggests that the instant proceeding is not the proper time to consider this particular issue. Whether the statute is overly broad can be better determined when the Court has a case on appeal with a full transcript of the proceedings to assist it." Neither side purports to have briefed or argued these last two constitutional questions thoroughly or adequately.

The present action is in prohibition and once the question of whether the trial judge will exceed his jurisdiction if he goes through with his intention to sustain defendant's motion to strike is determined, the prohibition action is settled. Clearly respondent is not contemplating making that order for the reason he considers the death penalty unconstitutional, because he permitted the death penalty issue to be tried in the first trial. Respondent is contemplating making the order for the reason that defendant was subjected to the death penalty in the first trial, but the jury rejected it, and hence defendant cannot be subjected to it again in the second trial, respondent believes. To go further and reach out to decide the constitutionality of the death penalty under art. I, § 21 of the Missouri Constitution is to violate our long established rule that we abstain from passing on constitutional questions which are unnecessary to a disposition of the

case. See the many cases so holding collected in 7 West's Missouri Digest, *Constitutional* Law, Key No. 46 (1).

I would await a case where the death penalty is squarely before us on direct appeal, with adequate briefing and argument, to pass on its constitutionality. We should not casually foreclose a question of this magnitude.

Additionally, the questions of whether the statutory aggravating circumstances are unconstitutional as unduly broad and vague, and whether the death penalty would be unconstitutional as cruel and unusual punishment if applied to this defendant are questions not ripe for adjudication, as this defendant has yet to stand trial, and we do not know what the outcome of the second trial may be. Defendant may not receive the death penalty in a second trial, even if the present case goes against him, nor do we know what evidence defendant may offer as to the cruel and unusual aspects of the death penalty. These are all questions properly addressed on appeal. "[P]rohibition cannot be substituted for an appeal." State ex rel. Vogel v. Campbell, 505 S.W.2d 54, 58 (Mo. banc 1974). I would quash the preliminary rule.

ROBERT E. SEILER
Judge

SUPREME COURT OF THE UNITED STATES

No. 79-6740

ROBERT BULLINGTON, PETITIONER

v.

MISSOURI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 6, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-6740 ORIGINAL COPY

ROBERT BULLINGTON, Petitioner

vs.

STATE OF MISSOURI, Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

George R. Westfall
Prosecuting Attorney
St. Louis County, Missouri

James J. Cook
Assistant Prosecuting Attorney
St. Louis County, Missouri
7900 Carondelet
Clayton, Missouri 63105

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT BULLINGTON, Petitioner	)	
vs.	)	No. 79-6740
STATE OF MISSOURI, Respondent	)	

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSOURI

TO: THE HONORABLE, THE CHIEF JUSTICE and
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES

The State of Missouri respondent herein, by George A. Westfall, Prosecuting Attorney and James J. Cook, Assistant Prosecuting Attorney hereby responds to the petition for Writ of Certiorari filed in this cause.

QUESTIONS PRESENTED FOR REVIEW

Respondent wishes to inform the Court that as to Petitioner's statement concerning what evidence will be presented at a second trial (p.2,A(c) of the petition), the State has indicated to the Missouri Supreme Court that it anticipates that the evidence to be presented will be substantially the same as at the first trial. The State does not know if it will be identical.

ARGUMENT

Double Jeopardy.

Petitioner's argument that a second trial in this case violates his Constitutional rights against double jeopardy is without merit. Petitioner assumes as true an interpretation of the law that has never been given judicial support. In North Carolina v. Pearce, 395 U.S. 711 this Court stated that the Double Jeopardy Clause

> protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple prosecutions for the same offense. Id at 717.

Petitioner states throughout his argument that he should not be subject to a retrial when in fact that is what he requested. It is well established that a person can be retried for the same offense after his motion for new trial is sustained. U.S. v. Ball, 163 U.S. 662, 672, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). Here however petitioner claims he has been acquitted of an offense and cannot be retried for that offense. This argument is not supported by the law.

All of the cases cited by petitioner deal with defendants who were trying to avoid the entire retrial of their case. In the instant case we are dealing only with the sentence to be available to the jury for imposing upon the defendant at his subsequent trial.

To avoid this problem petitioner invents a new offense, capital murder - death penalty, and declares that he has been acquitted of that offense.

But just in case the Court does not accept that fiction, petitioner also alleges that collateral estoppel bars the State from seeking the death penalty here. An examination of the instructions given the jury in the first trial (Exhibit C of Petitioner's Appendix) will disclose the fallacy of that argument. It is true that the jury must find beyond a reasonable doubt that an "aggravating circumstance" exists before it can return with a death penalty. However, the instructions are set up in such a way that a decision of life imprisonment does not mean that no aggravating circumstance was proven beyond a reasonable doubt. The jury may have found that such an aggravating circumstance did exist but for other reasons they choose not to impose the death penalty. The instructions allow this result.

Death - Qualified Jury.

Petitioner's logic here would require that this Court review every death penalty case before a jury was even picked. In every criminal case there are constitutional rights which are afforded the defendant. Everytime a trial judge rules against a defendant on any motion which involves a constitutional issue, the potential for error exists. Recent history has shown that where the death penalty is involved, a wide variety of constitutional questions may be raised. If petitioner is granted his writ because of this argument, every defendant in a capital case aggrieved by a trial judge ruling on a constitutional issue would be entitled to review by this Court before being tried. This is not judicial efficiency, but a break down in the orderly procedure of judicial review and appeal, which has been developed over many years of experience.

Question will again be before the court.

The State does not dispute the statement that the issue here is of great importance. However to assert, as petitioner does, that if this Court does not hear his plea now he will just have to bring it back later seems an unwarranted threat.

The State would suggest that the position held by petitioner will be as devoid of merit later as it is now. Just because an issue is important does not mean the Court must hear it. Some issues, as the one in question here, are basically without dispute except for petitioner's desires. This Court has already decided that a greater sentence upon retrial is constitutional. (Chaffin v. Stynchombe, 412 U.S. 17 (1973)). In Chaffin, this Court reaffirmed the decision in Stroud v. U.S., 251 U.S. 15 (1919) which specifically dealt with the death penalty.

As will be seen below, there is not the great conflict between the States over this issue that petitioner would have us believe.

Therefore, although the issue is important, there is no real reason for this Court to reexamine it at this time. The threat of petitioner that the issue will be brought late surely can have no effect.

The Cox case cited by petitioner as authority for this part of his argument does not require that this petition be accepted by the Court at this time. (Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 483 (1978)). It merely restates the principal that in many instances this Court will speak on important issues in a case which is already before it, even if those issues are not required to be addressed in order to reach a decision on the merits. It is a much larger step to grant this petition merely because some of the issues involved might come before the Court in the future.

Final Judgment Below.

The State does not dispute that the decision of the Missouri Supreme Court in State ex rel. Westfall v. Mason is a final judgment.

Conflict Between the States.

It is ture that if there is substantial conflict between the highest courts of various states, and particularly if these state decisions conflict with rulings of this Court, that certiorari may be granted to resolve the issue. However the State of Missouri suggests that the conflict here is very minor if it exists at all.

The leading case in California is People v. Henderson, 386 P.2d 677 (1963). This case was decided before Chaffin v. Stynchombe, 412 U.S. 17 (1973). The People v. Payne case cited by petitioner (142 Cal Rpt 320) does not apply because there the Court reached its decision because of a change in the capital murder law between the date of the offense and the second trial. People v. Johnson, 113 Cal. Rpt 303, was decided after Chaffin but seems to ignore it.

Additionally a close reading of Henderson will disclose that

the California court expresses concern over the conflict in the cases; a conflict which was resolved by Chaffin. The California court even decided that the Stroud decision was no longer good law. This Court specifically refused to overrule Stroud in Pearce.

Georgia decided this issue on specific non-constitutional grounds. In Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977) the Georgia Supreme Court decided that the death penalty would be automatically precluded in a retrial where life was the sentence at the first trial. This was based upon the statutory requirement that the state supreme court examine death sentences and set aside those which are disproportionate to sentences in other similar cases. Beside being non-constitutional, this decision is also illogical. Who is to say that the jury giving life was not aberrant. To automatically conclude that the jury giving life at the first trial was correct and all later juries must conform or be considere aberrant is just not logical. Be that as it may, this is not even considered a constitutional question according to the Georgia Supreme Court and therefore the Georgia case should not be considered here.

The Pennsylvania case cited, Commonwealth v. Littlejohn, 433 Pa. 336, 250 A.2d 811 (1969) also was decided before Chaffin. In fact a more recent Pennsylvania case should be noted. Commonwealth v. Klobuchir, 405 A.2d 881 (1979) says this:

> We also note that although Commonwealth v. Littlejohn was decided in 1969, it did not have the benefit of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), because Pearce was decided several months later. Because Pearce made it clear that neither due process, equal protection, nor double jeopardy pose absolute bars to increased punishment upon reconviction, the continuous vitality of Littlejohn as an interpretation of federal constitutional law is open to question. Id at n.15 p.888.

In Florida, the case cited (Robertson v. State, 258 So.2d 257 (1971))

was also decided before Chaffin. The Florida court read Pearce without the benefit of Chaffin.

In reality therefore there is not the great conflict that petitioner suggests. Only in California and Georgia would the decision be different from that in Missouri and those decisions are not enough to require this Court to act at this time.

A close examination of the cases cited by petitioner shows that the states do not disagree as to how to apply identical constitutional issues. Only California disagrees with Missouri in a post-Chaffin decision. This is surely not reason enough for this Court to step in.

Emotional Torment.

Petitioner's argument here is basically a restatement of his Witherspoon argument. However a few statements should be made.

Petitioner states that if the death penalty is allowed he will face great expense and substantial effort at the punishment phase of the trial. Petitioner presented no evidence whatsoever at his first trial punishment phase.

Counsel's concern over trial strategy should certainly not be considered a reason to grant certiorari. If all potential constitutional questions could be decided by the Court prior to trial, we could all have our tasks simplified. However this argument absolutely revises our judicial system.

Petitioner's real point in this entire effort is the "separate offenses theory"; his own invention. Nowhere in the law of this land can he find support for his proposition that he has been acquitted of something.

The jury in petitioner's first case was not required to find anything to sentence him to life. They were not required to find

the absence of anything either. To elevate the sentencing phase of the bifurcated trial to the leval petitioner seeks goes far beyond any decision previously handed down by this or any other Court.

One of the other arguments to disallow seeking the death penalty is that it would be disproportionate to the life sentence given at the first trial. Although it is true that the State has indicated to the Missouri Supreme Court that it anticipates that the evidence will be substantially the same at the second trial, it is entirely inappropriate to base a ruling upon that assertion. No one knows exactly how the evidence will come out at trial. And although the State has no indication that such would be the case, it is always possible that new evidence would develop right up until the trial date itself. Therefore to automatically declare that a death penalty at a second trial is disproportionate is premature and illogical.

Petitioner also discusses his allegation that the aggravating circumstances alleged are vague and therefore unconstitutional. Petitioner then condenses over seven days of testimony into two sentences and asks this Court to determine that this case falls into the rule promulgated by Godfrey v. Georgia, No. 78-6899. Surely the proper time for such a decision is upon appeal when the Court can view a transcript and learn all of the evidence.

Petitioner also addresses the "chilling effect argument." This was put to rest in Chaffin:

> ...The choice occasioned by the possibility of a harsh sentence even in the case in which the choice may in fact be difficult; does not place an impermissable burden on the right of a defendant to appeal or attack collaterally his conviction. 412 U.S. 35.

CONCLUSION

Petitioner raises several issues here which when read in the

light of the established law of this land are without merit. For the reasons set forth above it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

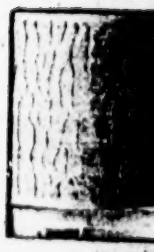
George R. Westfall

George R. Westfall
Prosecuting Attorney
St. Louis County, Missouri

James J. Cook

James J. Cook
Assistant Prosecuting Attorney
St. Louis County, Missouri
7900 Carondelet
Clayton, Missouri 63105
(314) 889-2600

Attorneys for Respondent.



79-6740

SUPREME COURT OF THE UNITED STATES

RECEIVED
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SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

ROBERT BULLINGTON,

Petitioner

vs.

STATE OF MISSOURI

Petitioner, Robert Bullington, who is now held in the St. Louis County Jail, at Clayton, Missouri, asks leave to file the attached petition for writ of certiorari to the Supreme Court of the State of Missouri without prepayment of costs and to proceed in forma pauperis. The petitioner's affidavit in support of this petition is attached hereto.

Richard H. Sindel, #23406
Attorney for Petitioner
15A N. Meramec, Suite 200
Clayton, Missouri 63105
314/721-6040

AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

ROBERT BULLINGTON,

Petitioner

vs.

STATE OF MISSOURI

I, Robert Bullington, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled cause, and, in support of my application for leave to proceed without being required to prepay costs or fees, state:

1. Because of my poverty I am unable to pay the costs of said cause.

2. I am unable to give security for the same.

3. I believe that I am entitled to the redress I seek in said cause.

4. The nature of said cause is briefly stated as follows:

I was found guilty of Capital Murder. After hearing evidence of aggravating circumstances which would have enabled the jury to return a verdict of death under the applicable law, the jury decided that I should be sentenced to life imprisonment in the State of Missouri, Division of Corrections, and I was so sentenced. My timely motion for a new trial was sustained by the trial court. The State filed notice that upon retrial the State would produce identical evidence of aggravation and again seek the death penalty. I filed a motion to strike the State's evidence of aggravation, and the trial court announced its intention to sustain my motion. The State sought and received a writ of prohibition against the trial court. The Supreme Court of Missouri ordered the writ be made absolute on March 11, 1980, upon denying my request for a rehearing thereby permitting the State to again seek the death penalty on retrial. My petition filed herewith seeks a review of that judgment.

Robert E. Bullington
ROBERT BULLINGTON

this 4 day of June, 1980.

Linda S. Soell
Notary Public

LINDA S. SOELL
MY COMMISSION EXPIRES APRIL 10, 1982

RECEIVED
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-6740 ORIGINAL COPY

ROBERT BULLINGTON, Petitioner

vs.

STATE OF MISSOURI, Respondent

REPLY TO RESPONSE OF THE STATE OF MISSOURI

Richard H. Sindel
Attorney for Petitioner
15A N. Meramec, Suite 200
Clayton, Missouri 63105

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT BULLINGTON, Petitioner	)	
vs.	)	No. 79-6740
STATE OF MISSOURI, Respondent	)	

REPLY TO RESPONSE OF THE STATE OF MISSOURI

TO: THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Robert Bullington, Respondent herein, by Richard H. Sindel, attorney, hereby replies to the Response of the State of Missouri filed in this cause.

ARGUMENT

The State in its reponse has failed to grasp, address or refute Petitioner's compelling reasons for granting the Writ of Certiorari. In an attempt to circumvent those issues presented by Petitioner, the State has filled their response with blanket statements unsupported by logic or law. Their "wait and see" approach to these life-threatening issues demands a reply.

Petitioner did indeed request a new trial of the jury's determination of guilt, but he never requested a new sentencing trial or reversal of the jury's verdict that he should not die. He never complained in post-trial motions about the procedures, instructions or rulings of the trial court at the sentencing trial. Petitioner should, by the trial court's decision, be subject to a retrial, but not at the cost of his life.

The State argues that to avoid the gas chamber defendant has invented a new crime, that of Capital Murder Punishable by Death. This invention does not belong to the Petitioner and the "fiction" the State refers to has received not only the support of the trial judge, the three judge panel of the Missouri Court of Appeals, and two dissenting

justices of the Missouri Supreme Court, but also that of the Court of Appeals for the Sixth Circuit. In Gully v. Kunzman, 592 F.2d 283 (C.A. 6th 1969) Judge Merritt held that the State would not be prohibited from seeking the death penalty at defendant's retrial where the penalty had not been sought in the first trial. This failure on the part of the State, reasoned Judge Merritt, could not be interpreted as an implied acquittal of the greater offense of Capital Murder Punishable by Death. However, in addressing this argument the Court stated as follows:

> "We do not think this analysis is farfetched, since, under the new scheme, a defendant convicted of a capital offense may not be sentenced to death except upon a finding, 'beyond a reasonable doubt,' of certain statutorily-prescribed 'aggravating factors'. These 'factors' might be conceived of as elements of the 'greater' crimes of 'capital murder/armed robbery' rather than simply as guides for the exercise of the sentencing authority's discretion to fix an appropriate punishment for one convicted of 'simple' wilfull murder and armed robbery".

The Supreme Court of New Jersey also discussed Petitioner's "fiction" in State v. Wolf, 216 A.2d 586, 590 (N.J. 1966), wherein the Court held that the State could not seek the death penalty on defendant's new trial basing its decision on "...procedural policies, which are the essence of the administration of criminal justice."

The State argues that by granting certiorari, the court would be granting to every defendant in a capital case, the pre-trial right to review the trial court's rulings. This argument has no merit and ignores that which the State is forced to concede; the judgment in State ex. rel. Westfall v. Mason, is a final judgment reviewable by this court and not an interlocutory appeal.

The State's argument further ignores the inescapable logic that if the State cannot under the United States Constitution relitigate and seek the death penalty at Petitioner's retrial, then the jury should not and must not be death-qualified. To death-qualify a jury where a sentence of death cannot be imposed unduly and impermissibly deprives the defendant of a jury of his peers, constitutionally qualified, and capable of determining the issues presented at trial. (Why should an entire segment of the population, those people opposed to the death

penalty, be denied to the defendant and omitted from the trial if their scruples would not interfere with their duties as jurors? Does the State contend that it should be allowed to death-qualify all jurors in all homicide cases regardless of the sentence that can be imposed legally?)

The State argues that the Petitioner has "threatened" the court with reassertion of the points raised in his petition at a later date. The principles cited in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) and other cases cited by the Petitioner are not threats but law. Undoubtedly, these issues will persist until there is a final determination. To assert that this statement of fact is a "threat" is unwarranted and unnecessary. The State, while attempting to hide behind the skirts of Chaffin, never addresses itself in its response or in any of its briefs to the fundamental and obvious fact that a bifurcated trial punishable by death is a creature distinct from the holdings and facts in Chaffin or Stroud, and as such will remain a point of dispute until resolved by this Court.

The State dismisses Petitioner's argument concerning the various conflicts between the states by contending that they are not substantial or were decided pre-Chaffin.

No where does the State contend that Chaffin affected or changed the law in those states. No where is it reflected that those decisions cited by defendant have been overruled post-Chaffin. In Alaska, Arkansas, California, Florida, Georgia, Illinois, Indiana, Minnesota, New Jersey, Oregon, Pennsylvania, and West Virginia, Petitioner would not be subject to the penalty of death on retrial. Shagloak v. State, 597 P.2d 142 (Alaska 1979)(chilling effect); Rush v. State, 395 S.W.2d 3 (Ark. 1965); Sneed v. State, 225 S.W. 895 (Ark. 1923), Ark Stat. Ann, Section 43-2153; Crane v. Superior Court, 165 Cal. Rptr. 249 (Cal. App. 1980); People v. Johnson, 113 Cal. Rptr. 303 (Cal. App. 1974); Robertson v. State, 258 So.2d 257 (Fla. 1971); Hall v. State, 244 S.E.2d 833 (Ga. 1978); People v. Pierce, 400 N.E.2d 62 (Ill. App. 1980), Ill. Rev. Stat. 1977 Ch. 38, Par. 1005-5-4; Ballard v. State, 318 N.E.2d 798

(Ind. 1974); State v. Holmes, 161 N.W.2d 650 (Minn. 1968); State v. Wolf, 216 A.2d 586 (N.J. 1966); State v. Martin, 594 P.2d 1276 (Ore. App. 1979); State v. Turner, 429 P.2d 565 (1967), State v. Sterling, 537 P.2d 578 (1975); Commonwealth v. Wright, 282 A.2d 266 (Pa. 1971), Commonwealth v. Caye, 244 A.2d 44 (Pa. 1972); Commonwealth v. Furman, 326 A.2d 891 (Pa. 1974); State v. Eden, 256 S.E.2d 868, 875 (W.Va. 1979) (holds that fear of harsher penalty burdens or chills defendant's right to appeal).

Even those states which would allow Missouri to proceed along the lines it intends recognize the need for a final resolution of the conflict. In State v. Fitzpatrick, 606 P.2d 1343, 1370 (Mont. 1980), the dissent accurately documents the various conflicting decisions that currently exist and argues most effectively those propositions promulgated by your Petitioner, characterizing this need for resolution as a "...question crying for an answer." It is a life crying for a future; a system crying for direction.

The State argues that Godfrey v. Georgia, _____ U.S. _____, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), cannot be dispositive because Petitioner's trial transcript is not available for review. It should be pointed out that the State did not disagree with Petitioner's concise summary of the facts and evidence at the trial and that the transcript of the first trial has been prepared and is available for review.

Finally, the State contends that Petitioner's argument concerning the "chilling effect" of the Missouri Supreme Court's decision has been decided by Chaffin. The choice alloted to defendant in Chaffin, although troublesome was not infinite, although difficult was not impossible, although risky was not suicidal. He did not have to choose between breathing air and breathing poison, between the law and his right to live, between constitutional guarantees and dust. That grisly choice, that unspeakable dilemma, that impossible calculation, confronts your Petitioner as well as all other defendants in Missouri and other states who have convinced the jury beyond a reasonable doubt that the sentence of death should not be imposed only to have to decide whether to once

again risk the executioner or forego their right to appeal that is freely granted to every other defendant in every other state. Those defendants so situated and your Petitioner face the choice that presented itself to the defendant in Fay v. Noia, wherein the Court stated: "...For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence. ...He declined to play Russian roulette in this fashion." 372 U.S. at 439-40.

It is for these reasons and those contained in his original Petition that Robert Bullington respectfully prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

Richard H. Sindel, #23406
Attorney for Petitioner
15A N. Meramec, Suite 200
Clayton, Missouri 63105
314/721-6040

CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed to James J. Cook, Assistant Prosecuting Attorney, St. Louis County, 7900 Carondelet, Clayton, Missouri, 63105, this 1st day of October, 1980.

Subscribed and sworn to before me this 1st day of October, 1980.

NOTARY PUBLIC

My Commission Expires:

LINDA S. SOELL
MY COMMISSION EXPIRES APRIL 10, 1982

No. 79-6740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT BULLINGTON,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF FOR THE PETITIONER, ROBERT BULLINGTON

RICHARD H. SINDEL
15A N. Meramec, Suite 200
Clayton, Missouri 63105
(314) 721-6040
Attorney of Record

GAIL GAUS
E. EUGENE OVERALL
Attorneys for Petitioner

PETITION FOR CERTIORARI FILED JUNE 9, 1980.
CERTIORARI GRANTED OCTOBER 6, 1980.

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

QUESTIONS PRESENTED FOR REVIEW

I. DOES THE DOUBLE JEOPARDY CLAUSE PROHIBIT THE STATE OF MISSOURI FROM SEEKING THE DEATH PENALTY AT PETITIONER'S SECOND TRIAL AFTER THE JURY AT HIS FIRST TRIAL DECLINED TO RETURN A VERDICT OF DEATH?

II. WOULD A SENTENCE OF DEATH BE EXCESSIVE AND DISPROPORTIONATE IN THIS CASE WHEREIN A JURY DETERMINED THAT A SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PROBATION OR PAROLE FOR A MINIMUM OF FIFTY YEARS WAS THE APPROPRIATE PUNISHMENT?

III. ARE THE APPLICABLE SECTIONS OF MISSOURI REVISED STATUTES SECTION 565.012, ET SEQ. - WHICH PERMIT A JURY TO IMPOSE A DEATH SENTENCE IF: (1) THE CRIME IS FOUND TO BE "OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE OR INHUMAN" OR (ii) THE DEFENDANT IS BELIEVED TO HAVE "A SUBSTANTIAL HISTORY OF SERIOUS ASSAULTIVE CRIMINAL CONVICTIONS" FACIALLY VAGUE AND OVERBROAD?

IV. IS PETITIONER'S RIGHT TO TRIAL BY JURY UNCONSTITUTIONALLY CHILLED BY PERMITTING THE STATE OF MISSOURI TO SEEK THE PENALTY OF DEATH AT PETITIONER'S RETRIAL, AFTER THE JURY AT HIS FIRST TRIAL RETURNED A SENTENCE OF LIFE IMPRISONMENT ONLY?

PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF MISSOURI

I. State of Missouri ex rel. George R. Westfall, Prosecuting Attorney of the County of St. Louis.

II. The Honorable Donald L. Mason, Judge of the Sixteenth Judicial Circuit

III. Robert Bullington, defendant in the case of State of Missouri v. Robert Bullington.

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THE OPINION AND JUDGMENT DELIVERED BY THE SUPREME COURT OF MISSOURI
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-6740

ROBERT BULLINGTON,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF FOR THE PETITIONER, ROBERT BULLINGTON

JURISDICTIONAL STATEMENT

On February 11, 1980, the Supreme Court of the State of Missouri entered judgment making its rule of prohibition requested by the State of Missouri, absolute. Petitioner's timely Motion for Rehearing was denied on March 11, 1980. The Petition for Writ of Certiorari was filed on June 9, 1980, and certiorari was granted on October 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

On September 3, 1977, an armed intruder broke into the home of Pamela Sue Wright. After binding her mother, Mrs. Wright, and brother, John Wright, he took Ms. Wright from the house stating that he had escaped from jail and was running from the Police. (Petitioner was not an escapee from any institution.) The intruder stated that he would "drop" Ms. Wright off in a small town unharmed. After the intruder left the residence, Mrs. Wright and her son waited until they heard a car drive off and then untied themselves and ran to a neighbor's house to summon the Police.

A composite drawing was made from their description and circulated in the newspapers. As a result of an anonymous tip and records indicating that an automobile registered in Robert Bullington's wife's name and operated by him was similar to an automobile that was seen parked near the residence on the day of the kidnapping, the Police sought to question Robert Bullington.

Mrs. Wright and her son were shown a series of "mug shots" which included a photograph of the Petitioner. Mrs. Wright tentatively identified a man other than Petitioner from the "mug shots" and her son identified Bullington as the intruder. A warrant for Bullington's arrest was issued and the photograph of Petitioner appeared in the daily newspapers and on the television news.

On September 11th, 1977, Pamela Wright's body was found floating in a creek in a wooded area. The medical examiner, after ruling out other possible causes of death, determined to a reasonable medical certainty that the victim had drowned. There was no evidence of trauma, sexual abuse, or struggle. There was a "very superficial" laceration on her forehead, but it could not be determined when or how the lesion had occurred.

In October of 1977, the Petitioner was arrested in the State of California, and, after waiving extradition he was returned to Missouri.

A line-up was conducted on October 13, 1977, and Petitioner was identified by John Wright, Mrs. Wright, however, was only able to make a voice identification.

On December 9, 1977, an indictment was filed in the Circuit Court of St. Louis County, State of Missouri, charging the Petitioner with Capital Murder, Kidnapping, Armed Criminal Action, Burglarly 1st Degree and Two Counts of Flourishing a Dangerous and Deadly Weapon (J.A. 3-6). On July 7, 1978, the State of Missouri, by letter, advised counsel for Petitioner of their intent to seek the death penalty if Petitioner were convicted of capital murder, charging the following aggravating circumstances (J.A. 12, 13):

> "The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive and criminal convictions;" 565.012.2

> "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;" 565.012.2(7)

The trial was commenced on October 4, 1978, and on October 11th, the jury returned its verdict of guilty on Capital Murder (J.A. 12). The next day the second stage of the bifurcated trial was commenced to consider whether Defendant should be sentenced to death or prison for fifty years without the possibility of probation or parole. The jury was instructed (J.A. 22-27) that to impose the death penalty they must find beyond a reasonable doubt that one of the two aggravating circumstances charged had been proven by the State (J.A. 23, 24) and further find beyond a reasonable doubt that any aggravating circumstances so proven was

sufficient to warrant the imposition of death (J.A. 24). They were then to determine whether those aggravating circumstances so found were outweighed by the mitigating circumstances (J.A. 24, 25) and finally find that the Petitioner should be put to death. (J.A. 25). Thereafter, evidence was introduced and the jury heard argument of counsel. The jury returned its verdict finding that Petitioner's punishment would be life imprisonment without probation or parole for a minimum of fifty years and rejected the State's case for death. (J.A. 27).

Petitioner filed a Motion for New Trial (J.A. 28-43) which was sustained by the trial court based on Petitioner's pre-trial motion to quash the jury panel (J.A. 14-16) and this Court's decision in *Duren v. State of Missouri,* 439 U.S. 357 (1979).

Before the second trial commenced, the State filed its Notice of Evidence in Aggravation citing as aggravating circumstances the identical statutory provisions they sought to prove in Petitioner's first trial and their intent to rely on the evidence and convictions previously disclosed to defense counsel before the first trial. (J.A. 45, 46). Petitioner filed his Motion to Strike Plaintiff's Notice of Evidence in Aggravation and to Exclude from Trial Evidence in Aggravation of Punishment contending that relitigation of the identical aggravating circumstances violated the Double Jeopardy Clause and chilled the Defendant's exercise of his constitutional rights (J.A. 47-49).

On March 26, 1979, the trial court indicated its intention to sustain Defendant's Motion to Strike (J.A. 52) and the State sought a Writ of Prohibition in the Missouri Court of Appeals for the Western District (J.A. 50-55). The Stop Order issued by that Court (J.A. 56, 57) was dissolved on May 30, 1979 (J.A. 58). The State sought and was granted transfer to the Supreme Court of Missouri En Banc (J.A. 59,

60) and a preliminary Writ of Prohibition was issued. On February 11, 1980, that preliminary Writ of Prohibition was made absolute (J.A. 80-100) with two Justices dissenting (J.A. 101-127). It is from this ruling that Petitioner herein seeks relief.

SUMMARY OF ARGUMENT

POINT I

From its earliest days, the concept of double jeopardy or *autrefois acquit* has protected an accused, who has been acquitted, from being retried. This protection preserves the finality of judgments, the defendant's interest in repose, and the unqualified right of the jury to determine the strengths or failings of the State's case beyond a reasonable doubt. The State of Missouri now seeks to nullify those findings because Defendant has been granted a new trial on the issue of his guilt. The trial court, pursuant to the controlling statutes, instructed the jury that death could only be imposed if the evidence proved beyond a reasonable doubt that certain specific aggravating circumstances existed; that those aggravating circumstances were sufficient to warrant the imposition of death; and that those circumstances were not outweighed by mitigating factors. Under these guidelines, the jury refused to return a verdict of death. This verdict must be afforded the same constitutional protection as has always been granted jury verdicts of acquittal, whether expressed or implied. *Green v. United States,* 355 U.S. 184, 187-188 (1957). The fact that it is the Defendant's right to life that the State wishes to relitigate further magnifies the Petitioner's compelling need for protection from the constitutional encroachments proposed by the State and approved by the Supreme Court of Missouri.

The constitutional procedures mandated for the imposition of death as well as the unquestioned qualitative desparity between it and any other sentence strongly suggests that *Stroud v. United States,* 251 U.S. 15 (1919), *North Carolina v. Pearce,* 395 U.S. 711 (1969), and *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973) should be reconsidered.

If a defendant is ever to have an interest in repose it cannot be more compelling than granting him the right to be free of the shadow of death, and if ever a jury verdict is entitled to solemnity and sanctity it is where that verdict assures to him the right to life.

POINT II

Allowing the State the opportunity to convince a second jury that Robert Bullington deserves to die will again stain the judicial system with the taint of caprice, emotion, or freakish whim condemned in *Furman v. Georgia,* 408 U.S. 238 (1972). The State has conceded that its evidence at the second trial will be identical to the evidence adduced and argued at the first, and although obviously dissatisfied with the juries' verdict of life, the State never voiced objections to the juries' composition or abilities. Considering the facts and circumstances presented in this case, if a jury were to sentence the Petitioner to death one could only conclude: (i) that said assessment was excessive in light of the jury's sentence at Petitioner's first trial; (ii) that said punishment was substantially disproportionate to the sentence he received at the first trial; or (iii) those principles expressed in *Furman* are devoid of factual application. The Supreme Court of Missouri's refusal to address Petitioner's argument and its attempt to side-step the issue only re-enforced the

Petitioner's need to be assured that there will be no arbitrary or capricious imposition of an excessive and disproportionate sentence.

POINT III

The State intends to rely on two aggravating circumstances to convince a jury at the penalty phase that Petitioner should be sentenced to death:

> "The offense was committed by a person who has a substantial history of serious assaultive criminal convictions;"
>
> "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind;"

Without a limiting or restrictive construction those alleged guidelines offer no actual restraint on the arbitrary and capricious infliction of the death sentence. *Godfrey v. Georgia,* ____ U.S. ____ , 64 L.Ed.2d 398 (1980). The Missouri Supreme Court's refusal to define those terms or provide the jury with specific guidelines to channel their discretion renders these provisions facially vague and overbroad, a determination the lower court felt was unnecessary based on their misinterpretation of the holdings in *Gregg v. Georgia,* 428 U.S. 153, 201 (1976).

Petitioner's jury and all other Missouri juries when considering whether death should be imposed will be obliged to create their own standards and definitions from the jumble of prejoratives that comprise these provisions.

Alabama, Arizona, California, Louisiana, Nebraska and North Carolina have all recognized the inherent vagueness and overbreadth of statutory aggravating circumstances similar to Missouri's, and have severely limited their construction and application. The Missouri Supreme

Court's refusal "to tailor. . .its law" or "to define the crimes for which death may be the sentence [promotes] 'standardless sentencing discretion,' " *Godfrey v. Georgia,* supra, 64 L.Ed.2d at 406 under two provisions that are plainly vague in construction and overbroad in application.

POINT IV

There is, at present, only one choice available to the Defendant if he wishes to avoid subjecting himself to a trial that may result in his death - waive his VI Amendment right to trial by jury. The right to a trial by jury is the most valued right defendant possesses but its value pales when the alternatives are considered. *Jackson v. United States,* 390 U.S. 570 (1968) protects the Petitioner from being compelled to choose from "Hobson's horses."

ARGUMENT

POINT I

THE DOUBLE JEOPARDY CLAUSE PROHIBITS THE PROSECUTION FROM SEEKING THE DEATH PENALTY AT PETITIONER'S SECOND TRIAL AFTER THE JURY AT HIS FIRST TRIAL DECLINED TO RETURN A VERDICT OF DEATH.

In 1978 the State of Missouri put Robert Bullington on trial for capital murder and sought to secure a sentence of death. The State obtained a conviction, but at the penalty trial the jury rejected the State's case for death and instead returned a verdict of life imprisonment. Since the underlying conviction was obtained in violation of the Court's decision

in *Duren v. Missouri,* 439 U.S. 357 (1979), the State must now accord Mr. Bullington a new trial on the question of guilt. The issue before the Court in this case is whether the State may seize upon the occasion to subject Mr. Bullington to a second death penalty trial in the event of conviction, even though it has already tried and failed to convince an earlier jury to return a verdict of death.[1]

Plainly, the jury at Petitioner's first trial was "empowered . . . to answer 'yes' or 'no' to the question whether this defendant was fit to live." *Witherspoon v. Illinois,* 391 U.S. 510, 521 n.20 (1968). Equally plainly, it answered that question "yes." Accordingly, "much more is involved here than a simple determination of sentence." *Ibid.*

Like the Texas juries whose role at the penalty phase of a capital trial this Court has recently described, a Missouri jury "must be allowed to consider 'on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.' " *Adams v. Texas,* 48 U.S.L.W. 4869, 4871 (U.S., June 25, 1980). This consideration is not left unguided. Under Missouri law, as

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[1]Three States have held that the Double Jeopardy Clause prohibits the prosecution from forcing the accused to defend against the death penalty a second time under these circumstances. *Sanne v. State,* ____ S.W.2d ____, #63,254 (Tex. Crim. App. Sept. 10, 1980); *Commonwealth v. Littlejohn,* 443 Pa. 336, 250 A.2d 811 (1969); *People v. Henderson,* 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963) (Traynor, J.) See also *Roberson v. State,* 258 So.2d 257 (Fla. 1971). To counsel's knowledge, no state other than Missouri and no United States Court of Appeals has adopted the contrary position.

The opinion below relies upon the decision of one Court of Appeals in an analogous situation, *Gully v. Kunzman,* 592 F.2d 283 (6th Cir. 1979). However, *Gully* is not a case in which the jury actually rejected the State's case for the death penalty at a previous trial and that decision expressly rejects the inference drawn by the Missouri Supreme Court. *Id.* at 289.

required by the Constitution (see *Gregg v. Georgia,* 428 U.S. 153, 188-189, 195-196 n.47 (1976) (plurality opinion)), the jury's penalty-phase decision is "always circumscribed by. . .legislative guidelines," *id.* at 207, which "require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant," *id.* at 198. The jury's task in the penalty phase therefore requires both the determination of facts and the application of legal standards to those facts. See *Adams v. Texas, supra,* 48 U.S.L.W. at 4872.

In this context, the jury's judgment that death "is [not] the appropriate punishment in a specific case" (*Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) (plurality opinion)), has all of the characteristics of an acquittal of the prosecution's charge that the defendant deserves to die. The Court "has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is expressed or implied." *Price v. Georgia,* 398 U.S. 323, 329 (1970). See also *Burks v. United States,* 437 U.S. 1, 10-11, 16 (1978); *Sanabria v. United States,* 437 U.S. 54, 75 (1978); *Fong Foo v. United States,* 369 U.S. 141, 143 (1962); *Kepner v. United States,* 195 U.S. 100, 130 (1904). As the Court declared in *Green v. United States,* 355 U.S. 184, 187-188 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . .

See also *Abney v. United States,* 431 U.S. 651, 661 (1977); *Breed v. Jones,* 421 U.S. 519, 529-530 (1975); *Serfass v. United States,* 420 U.S. 377, 388 (1975); *United States v.*

Jorn, 400 U.S. 470, 479 (1971); *United States ex rel. Hetenyi v. Wilkins,* 348 F.2d 844, 858 (2d Cir. 1965) (Marshall, J.), *cert. denied,* 383 U.S. 913 (1966). A defendant may only be "forced to run the gauntlet once," *Green v. United States, supra,* 355 U.S. at 190, a principle which could not be more relevant than in a case where the "gauntlet" is literally a test of life or death.[2]

The Petitioner's reliance on the integrity of the jury verdict is "fundamental"[3] to the double jeopardy clause, because it is "absolute."[4] "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' " *Swisher v. Brady,* 438 U.S. 204, 214 (1978). Since the turn of the century this guarantee of finality has remained unscathed and continues to be "[t]he very foundation upon which the double jeopardy clause is based." *United States v. Ball,* 163 U.S. 662, 671 (1896) and is at the very "heart" of the Double Jeopardy Clause. *Jeffers v. United States,* 432 U.S. 137, 150 (1977) (plurality opinion).

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[2]The prohibition against retrial after acquittal is so fundamental that it may not be waived even by the failure to object or to enter a plea of *autrefois acquit. De Mino v. New York,* 404 U.S. 1305 (1972), rev'g 29 N.Y.2d 602, 273 N.E.2d 133, 324 N.Y.S.2d 402 (1972).

[3]*United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977).

[4]*Burks v. United States,* 437 U.S. 1, 16 (1978). See also Westen, *The Three Forces of Double Jeopardy,* 78 Mich. L. Rev. 1000, 1004 (1980).

The reasons underlying this rule of finality[5] are none the less compelling in this case where Petitioner seeks to foreclose from the State the forbidden "second crack" at his life *Swisher v. Brady, supra,* 438 U.S. at 216 (1978).

In this case, the State "has been given one fair opportunity to offer whatever proof it could assemble," *Burks v. United States,* 437 U.S. 1, 16 (1978), in support of its quest for the death penalty. The State offered that proof at the penalty phase of the first trial, and the jury, guided by the Court's instructions (J.A. 22-27) found the evidence insufficient to justify a sentence of death. Obviously "the purposes of the [Double Jeopardy] Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple.' " *Burks v. United States, supra,* 437 U.S. at 17.

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[5]Authorities have postulated various reasons for the application of such an inflexible rule as is accorded to jury verdicts of acquittal, e.g.: "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may become guilty." *Green v. United States,* 355 U.S. 184, 187-188 (1957); "Granting the government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal." *United States v. Wilson,* 420 U.S. 332, 352 (1975); it would allow "the government with [its] vastly superior resources [to] wear down the defendant so that 'even though innocent he may be found guilty.' " *United States v. Scott,* 437 U.S. 82, 91 (1978); "to protect the integrity of a final judgment" *United States v. Scott, supra,* 437 U.S. at 91; or the defendant's Sixth Amendment right to a jury trial. Westen, *The Three Faces of Double Jeopardy, supra,* 1004-1023 (1980).

It is true, of course, that the Court has declined in former years to hold that a life sentence imposed at a defendant's first capital trial barred the imposition of the death sentence at a retrial following appellate reversal of his first conviction. *Stroud v. United States,* 251 U.S. 15 (1919). It is also true that the Court has held more recently that double jeopardy does not generally forbid the imposition of a higher sentence following retrial. *North Carolina v. Pearce,* 395 U.S. 711, 719-721 (1969); *Chaffin v. Stynchcombe,* 412 U.S. 17, 24 (1973). But just as constitutional evolution and the development of a distinctly different form of state death-sentencing procedure in the wake of *Furman v. Georgia,* 408 U.S. 238 (1972), led this Court in *Gardner v. Florida,* 430 U.S. 349, 357-358 (1977) (plurality opinion), to reconsider the premises and conclusions of *Williams v. New York,* 337 U.S. 241 (1949) within the setting of these new and different death-sentencing proceedings, so the same developments require the reconsideration of *Stroud* and the distinguishing of *Pearce* and *Chaffin.*

Stroud no longer governs because it did not involve the capital sentencing proceedings of the present day, with their bifurcated trials and statutory guidelines for factfinding and judgment. *Pearce* and *Chaffin*, of course, neither involve this kind of penalty trial with its legal specification of factual issues for the jury's consideration nor were they decided under this Court's present day determination that the punishment of death is "unique in its severity and irrevocability," *Gregg v. Georgia,* 428 U.S. 153, 187 (1976) (plurality opinion).

Missouri, like all other death penalty states, today provides for a separate trial on the issue of life or death. §565.006, R.S.Mo. (1978). At this trial the jury is instructed as to a series of statutory aggravating and mitigating circumstances, designed to guide and channel its sentencing discretion. § §565.012.2 and 565.012.3 R.S.Mo. (1978).

The jury can not impose the death penalty unless it finds at least one aggravating circumstance beyond a reasonable doubt, specifies in writing the aggravating circumstance or circumstances found, and determines that any mitigating circumstances which may exist do not outweigh the aggravating circumstance or circumstances. § § 565.012.1, 565.012.4, and 565.012.5, R.S.Mo. (1978).

This statutory procedure is a far cry from routine jury sentencing, where "[n]ormally, there would be no way for a jury to place on the record the reasons for its collective determination, and ordinarily the resentencing jury would not be informed of any conduct of the accused unless relevant to the question of guilt." *Chaffin v. Stynchcombe, supra,* 412 U.S. at 28, n.15 (1973). Here, there is a separate trial proceeding at which the jury must make specific findings, pursuant to statutory standards, if death is to be imposed. Where the State has been unable at such a proceeding to secure the death penalty, the jury's determination is functionally equivalent to an acquittal for purposes of double jeopardy analysis: "[T]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United*

States, supra, 437 U.S. at 11 (1978).[6] The State has had one chance to convince a jury that Petitioner should be executed, and has "failed to prove its case" for a verdict of death. *Burks v. United States, supra,* 437 U.S. at 15.[7]

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[6]Here, the State does not even claim that it has any new evidence to muster at a second penalty trial. Indeed, it conceded three times at oral argument in the court below that it would present precisely the same evidence adduced at the previous trial at which the jury declined to return a verdict of death. (J.A. 62, 69); 594 S.W.ed at 922, 925, 926 (Seiler, J. dissenting). However, even if the State were to claim that it has found new evidence, it would not be entitled to subject Petitioner to a second death penalty trial. "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks v. United States, supra,* 437 U.S. at 11, n.6.

Even if the Double Jeopardy Clause were not applicable here, the State's concession that it would present precisely the same evidence at a second penalty trial would be controlling were the Court to apply the Due Process principles of *North Carolina v. Pearce, supra,* 395 U.S. at 723-26 (1969). For the reasons stated above, we submit that *Pearce* at least should be applicable to jury sentencing under Missouri's death penalty statute, notwithstanding the Court's decision in *Chaffin* that *Pearce* does not apply to jury sentencing in general. However, because the Double Jeopardy Clause is so manifestly applicable here, the Court need not reach that question.

[7]Under the death-sentencing statutes in force prior to *Furman v. Georgia,* 408 U.S. 238 (1972), the jury would typically render a verdict of guilty with or without mercy after a single trial, and the Double Jeopardy issue would turn upon whether a verdict specifying mercy constitutes a "lesser included offense" of a verdict of death and implies an acquittal as to death under *Green v. United States, supra.* See *Commonwealth v. Littlejohn, supra,* 433 Pa. 336, 250 A.2d 811 (1969); *People v. Henderson, supra,* 60 Cal.2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963). Here, however, there is nothing "implied" about the jury's action at Petitioner's first trial. At a separate penalty hearing conducted under Missouri's statutory death-sentencing standards, the jury rejected outright the prosecution's case for a verdict of death. See *Sanne v. State, supra* (1980).

The majority below engaged in considerable speculation as to the precise ground for the jury's action at the first trial, contending that it is the legislature's role to determine lesser included offenses, 594 S.W.2d

(continued)

In this setting, there can be no doubt of the full applicability of the purposes underlying the time-honored "universal maxim. . .that no man is to be brought into jeopardy of his life, more than once, for the same offense," 4 BLACKSTONE, COMMENTARIES *335, quoted in *Crist v. Bretz,* 437 U.S. 28, 33 n.8 (1978). Permitting the prosecution to attempt for a second time to make its once-failed case for the defendant's death would affront "a primary purpose served by [the]. . . rule [against double jeopardy, which] is akin to that served by the doctrines of *res judicata* and collateral estoppel — to preserve the finality of judgments." *Id.* at 33; see also *United States v. Scott,* 437 U.S. 82, 92 (1978). And "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that [even though deserving of life, he may not

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(footnote continued from preceding page)
at 912, 913 (J.A. 85) and apparently rejected its earlier holdings defining a lesser included offense (i.e., "If the greater of two offenses includes all the legal and factual elements of the lesser. . . ." *State v. Amsden,* 299 S.W.2d 498, 504 (Mo. 1957)) and the requirement that the courts are responsible for determining what constitutes a lesser included offense. *State v. Stone,* 571 S.W.2d 486 (Mo. App. 1978); *State v. Fleming,* 528 S.W.2d 513 (Mo. App. 1975); Rule 28.02(e), (f) V.A.M.R. However, even under this Court's "implied acquittal" cases, it is of absolutely no consequence whether the jury at Petitioner's first trial rendered its verdict of life imprisonment because it (i) believed that no aggravating circumstance had been proved beyond a reasonable doubt or (ii) believed that there was mitigating circumstance or circumstances that outweighed the evidence in aggravation. Regardless of the basis for the jury's reasoning, it " 'was given a full opportunity to return a verdict' " of death, yet declined to do so. *Price v. Georgia, supra,* 398 U.S. at 329 (quoting *Green v. United States, supra,* 355 U.S. at 191). See also *United States ex rel. Hetenyi v. Wilkins, supra,* 348 F.2d at 856-857 (2d Cir. 1965), *cert. denied,* 383 U.S. 913 (1966).

be able to demonstrate it]," *id.* at 91. Finally, the "ordeal" of a second trial, after the prosecution has once tried and failed to make its case, see *Green v. United States,* 335 U.S. 184, 187 (1957), is magnified immeasurably when the two trials are for the defendant's life.

The issues decided in *Pearce* and *Chaffin* simply did not present the Court with the enormities of forcing a capital defendant to stand trial for his life a second time after having convinced the jury beyond a reasonable doubt at this previous sentencing trial to reject the State's case for the death penalty. For both *Pearce* and *Chaffin* the increased sentences received at their second trial meant additional years in prison but

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than 100-year prison term differs from one of only a year or two.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). As the Court recognized in *Gardner v. Florida,* 430 U.S. 349, 357-58 (1977) (plurality opinion):

> From the point of view of the defendant, it is different both in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.[8]

Indeed, since *Furman* the Court has consistently and continually echoed its findings that " 'the penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. . . . [A]nd it is unique finally in its absolute renunciation of all that is embodied in our concept of humanity.' Id., at 306.

[8]See also *Lockett v. Ohio,* 438 U.S. 586, 604 (1978); *Beck v. Alabama,* ____ U.S. ____ , 65 L.Ed.2d 392, 403 & n.13 (1980).

(Stewart, J. concurring). This theme, the unique nature of the death penalty... has been repeated time and time again in our opinions." *Rummell v. Estelle,* 445 U.S. 263, 272 (1980). Obviously, being compelled to defend against the death penalty a second time subjects the defendant to a unique degree of "personal strain, public embarrassment, and expense,"[9] of "heavy pressures and burdens — psychological, physical and financial,"[10] of "embarrassment, expense and ordeal...compelling him to live in a continuing state of anxiety and insecurity...."[11] Where the defendant has already persuaded the jury at an earlier sentencing trial to return a verdict against death, forcing him to endure a second capital trial is nothing short of monstrous:

> Such a prosecution... [is] cruel and inhuman, imposing on the accused a "hardship so acute and shocking that our policy will not endure it." (*Palko v. State of Connecticut,* 302 U.S. 328, 58 S.Ct. 149, 153, 82 L.Ed. 288)....

United States ex rel. Hetenyi v. Wilkins, supra, 348 F.2d at 857 (2d Cir. 1965), *cert. denied,* 383 U.S. 913 (1966).

The State of Missouri has had its chance to kill Robert Bullington, and has failed to convince a jury that he should be put to death. Under the Double Jeopardy Clause, it should not be permitted to subject him to a second death penalty trial.

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[9]*Abney v. United States, supra,* 431 U.S. at 661 (1977).

[10]*Breed v. Jones, supra,* 421 U.S. at 530 (1975).

[11]*Green v. United States, supra,* 355 U.S. at 187-188 (1957).

POINT II

A SENTENCE OF DEATH WOULD BE EXCESSIVE AND DISPROPORTIONATE IN THIS CASE.

In order to pass constitutional muster, a punishment may not be excessive or disproportionate. *Robinson v. California,* 370 U.S. 660 (1962); *Trop v. Dulles,* 356 U.S. 86 (1958); *Weems v. United States,* 217 U.S. 349 (1910). While the Court has held that a sentence of death for the offense of intentional homicide is not *per se* excessive or disporportionate, *Gregg v. Georgia, supra,* 428 U.S. at 187, it has also recognized that a decision that death is the appropriate punishment in a particular case must be an individualized determination based on the character of the specific offender and the circumstances of the particular offense. See *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976) and *Roberts v. Louisiana,* 428 U.S. 325, 33 (1976). For one jury to sentence Petitioner to death after a prior jury has determined on the same evidence that life without the possibility of parole for fifty years is a sufficient "expression of society's moral outrage," *Gregg v. Georgia, supra,* 428 U.S. at 183, would be to impose a sentence that is both excessive and disproportionate. Moreover, to force Petitioner through the trauma of another capital trial and expose him to the possibility of an arbitrary and capricious result would be nothing short of cruel.

A. DISPROPORTIONALITY

When this Court in 1976 approved the Georgia, Florida and Texas capital-sentencing statutes on their face, *Gregg v.*

Georgia, supra; Proffitt v. Florida, 428 U.S. 242 (1976); *Jurek v. Texas,* 428 U.S. 262 (1976), it did so on the assumption that the statute at issue, as interpreted by the highest courts of the states, would guarantee against the arbitrary and capricious infliction of the death penalty which had been condemned in *Furman v. Georgia,* 408 U.S. 238 (1972). The Court placed particular reliance on the procedures for appellate review, *Gregg v. Georgia, supra,* 428 U.S. at 166-68, 204-06 (opinion of Stewart, Powell and Stevens, JJ.); *id.* at 222-24 (White and Rehnquist, JJ. and Burger, CJ., concurring), viewing it as an effective means by which the state would insure that the death penalty would be applied in a fair, rational, consistent and evenhanded manner, *Proffitt v. Florida, supra,* 428 U.S. at 259-60; *Jurek v. Texas, supra,* 428 U.S. at 276; see also *Gardner v. Florida,* 430 U.S. 349, 361 (1977), so that similar cases would reach similar results, *Gregg v. Georgia, supra,* 428 U.S. at 198, 208 (opinion of Stewart, Powell and Stevens, JJ.); *id.* at 223 (White, J. concurring); *Proffitt v. Florida, supra,* 428 U.S. at 251, 253, 258 (opinion of Stewart, Powell and Stevens, JJ.); *Jurek v. Texas, supra,* 428 U.S. at 270, (opinion of Stewart, Powell and Stevens, JJ.); *id.* at 279 (White and Rehnquist, JJ., and Burger, CJ., concurring) and there would be a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia, supra,* 428 U.S. at 198, quoting *Furman v. Georgia, supra,* 408 U.S. at 313 (White, J. concurring).

Although, ordinarily there might be some debate as to whether two capital cases are sufficiently similar to compel a similar result in each, if Petitioner is retried and sentenced to death there unquestionably is a case "on all fours" to which his capital case should be compared—his own case on the first trial. Since the prosecutor has repeatedly represented to the courts below that he has no additional evidence to

present on retrial, (J.A. 62,69) the two cases are more than similar, they are for all practical purposes identical.[12] Where the same defendant is being tried under the identical statutes for the identical offense on the identical set of facts, there is no "principled way to distinguish" the two cases, *Godfrey v. Georgia, supra,* 64 L.Ed.2d at 409, and a sentence of death is *a fortiori* disproportional and unconstitutional. To say otherwise would be to concede that the Missouri death sentencing system is no more than a "senseless lottery," *Furman v. Georgia, supra,* 408 U.S. at 277 (Brennan, J., concurring), and would mean that the Eighth Amendment "[r]ights declared in words [would] be lost in reality." *Weems v. United States,* 217 U.S. 349, 373 (1910).[13]

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[12]Even if this admission had not been made by the State, the two aggravating circumstances on which notice was given for the retrial (J.A. 45) are the same as those presented at the first trial. (J.A. 12) While decidely vague (see supra pp. 21), these aggravating circumstances by their nature involve facts about the defendant and the circumstances of the offense that could not and in fact have not changed since the first trial. Furthermore, the Supreme Court of Missouri's attempt to distinguish this case from *Ward v. State,* 239 S.E.2d 365 (1977), in which the Supreme Court of Georgia adopted the position now urged by Petitioner, on the ground that the evidence at Petitioner's second trial may differ from that presented in the first, ignores the fact that the evidence in Ward's second trial was not precisely the same as in the first. As the dissent makes clear in *Ward,* additional information concerning the defendant's guilt was introduced at the retrial; the Georgia court, nonetheless found a subsequent sentence of death to be disproportionate to the life sentence imposed at Ward's first trial.

[13]The Supreme Court of Missouri posited that since Petitioner's life sentence at the first trial might be the act of an "aberrant" jury, 594 S.W.2d at 917, (J.A. 96), the verdict should not prevent the state from obtaining a death sentence on the same evidence on retrial. While it is, of course, possible that the jury verdict was not based in reason, it is constitutionally unacceptable to assume that such was the case, to Petitioner's prejudice. It is, rather, to be assumed that jurors behave as reasonable people. Further, Missouri's decision in formulating its

(continued)

B. EXCESSIVENESS

Because the death penalty is different from any sentence of imprisonment, no matter how long, in both its severity and finality, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina, supra,* 428 U.S. at 305. *Cf. Beck v. Alabama,* ____ U.S. ____ , 65 L.Ed.2d 392 (1980).

This court has cited with approval the rule that a jury recommendation of life should be followed unless "the facts supporting the sentence of death are so clear and convincing that no reasonable person could differ." *Proffitt v. Florida, supra,* 428 U.S. at 249, citing *Tedder v. State,* 322 So.2d 908, 910 (1975). The rule has its basis in the "fundamental respect for humanity underlying the Eighth Amendment" *Woodson v. North Carolina, supra,* 428 U.S. at 304 and reflects an understanding that once representatives of the community have decided that neither the interests of retribution nor of deterrence require more than the sentence of life in a particular case, it cannot be said with confidence that, to the contrary, "death is the appropriate punishment." *Id.* at 305. If it has been determined, as it was in Petitioner's case, that life without the possibility of parole for fifty years is a sufficient punishment, then the imposition of the incomparably more harsh and painful punishment of death would be no more than the "gratuitous infliction of suffering." *Gregg v. Georgia, supra,* 428 U.S. at 183 (opinion

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(footnote continued from preceding page)

legislation *not* to require findings by the jury in cases in which life is imposed cannot now be used as a weapon against Petitioner. This is particularly true in light of this Court's insistence that in death cases all doubts about a particular finding be resolved in favor of the accused. *Andres v. United States,* 333 U.S. 746 (1948).

of Stewart, Powell and Stevens, JJ.) To impose death on Petitioner where life has been deemed the "appropriate punishment" would be to impose an unconstitutionally excessive punishment.

The Court has made clear that "[i]t is of vital importance to the defendant and the community that any decision to impose death be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida,* 430 U.S. 349, 358 (1977). No defendant who has run the gauntlet of a capital trial and escaped with his life could believe in the fairness, justness or rationality of a subsequent determination to sentence him to death at a retrial in which no additional evidence was produced. Nor could the community be confident that its system of justice was functioning without the taint of caprice, emotion or freakish whim. Having once weathered the perils of a capital trial, a defendant should not be forced back into the storm a second time to see whether he might this time be "struck by lighting." *Furman v. Georgia,* 408 U.S. 238, 309 (1972) (Stewart, J. concurring).

POINT III

THE APPLICABLE SECTIONS OF MISSOURI REVISED STATUTES § 565.012, ET SEQ. - WHICH PERMIT A JURY TO IMPOSE A DEATH SENTENCE IF: (i) THE CRIME IS FOUND TO BE "OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE OR INHUMAN" OR (ii) THE DEFENDANT IS BELIEVED TO HAVE "A SUBSTANTIAL HISTORY OF SERIOUS ASSAULTIVE CRIMINAL CONVICTIONS" ARE FACIALLY VAGUE AND OVERBROAD.

The Supreme Court of Missouri, by refusing to clarify or limit the construction and application to be given to § 565.012.2(7) and by misapplying this Court's holding in *Gregg v. Georgia,* 428 U.S. 153 (1976), has obviated that decision's constitutional mandate that the sentencer's discretion, in capital cases, be "directed" and "limited."

This Court on three occasions has examined statutory aggravating circumstances adopted by different states in response to the Court's requirement "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *Gregg v. Georgia, supra,* 428 U.S. at 189 (plurality opinion of Stewart, Powell and Stevens, JJ.).

In *Gregg v. Georgia,* the court reviewed in passing[14] a

[14]The court expressly noted that "[i]n light of the limited grant of certiorari," it would "review the 'vagueness' and 'overbreadth' of the statutory aggravating circumstances only to consider whether their imprecision renders this capital-sentencing system invalid under the Eighth and Fourteenth Amendments." *Gregg v. Georgia, supra,* 428 U.S. at 201 n.51.

Georgia statutory aggravating circumstance quite similar to subsection .2(7) of the Missouri capital statute, which identifies as aggravated those murders characterized by, "torture, depravity of mind or an aggravated battery."[15] Noting that "[i]t is. . .arguable that any murder involves depravity of mind or an aggravated battery," *Gregg v. Georgia, supra,* 428 U.S. at 201, the Court nevertheless found that the only case in which the Georgia Supreme Court had in fact upheld a death sentence based solely on this aggravating circumstance was a "horrifying torture-murder," *Id.* In that light, the Court concluded that "there is no reason to assume that the Supreme Court of Georgia will adopt an open-ended construction," *id.,* in violation of the Eighth and Fourteenth Amendments.

The Court's second review of aggravating circumstances came in *Proffitt v. Florida,* 428 U.S. 242 (1976), in which a

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[15]Under Ga. Code Ann. §27-2534.1(b)(7)

> "the judge shall consider, or he shall include in his instructions to the jury for it to consider. . .any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> * * *
>
> (7) The offense. . .was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

Missouri Rev. Stat. §565.012.2(7) reads:

> "Statutory aggravating circumstances shall be limited to the following:
>
> * * *
>
> (7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."

Thus, the Missouri statute differs chiefly from its Georgia counterpart by the absence of any specification of "aggravated battery" as a quantitative consideration guiding the jury's use of the circumstance.

vagueness and overbreadth challenge was asserted aginst Florida's equivalent aggravating circumstance.[16] The Court in *Proffitt,* guided by the principle that this "provisio[n][17] must be considered as [it has] been construed by the Supreme Court of Florida," *Proffitt v. Florida, supra,* 428 U.S. at 255, observed that Florida by judicial construction had in fact limited the circumstance to " 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' " *Id.* The Court declined to "say that the provision, as so construed, provides inadequate guidance," *id.* at 256, under Eighth Amendment standards.

The Court's third encounter with a statutory aggravating circumstance in a capital case came in the last Term, in *Godfrey v. Georgia,* ____ U.S. ____ , 64 L.Ed.2d 398 (1980), in which the petitioner challenged the application to his case of the same aggravating circumstance reviewed briefly in *Gregg,* a circumstance almost identical to the statutory provision before the court in the present case.

The Court in *Godfrey* acknowledged that

> "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible or inhuman.' "

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[16]Under Fla. Stat. Ann. §921.141(5)(h)

"Aggravating circumstances shall be limited to the following:

* * *

(h) The capital felony was especially heinous, atrocious, or cruel."

[17]Another statutory aggravating circumstance Fla. Stat. Ann. §921.141(5)(c), which is not relevant for present purposes, was also under challenge in *Proffitt.*

Godfrey v. Georgia, supra, 64 L.Ed.2d at 406. The Court thereby recognized that in the absence of something more to guide the jury than the opaque language of (b)(7) the statute could not stand. Although the court found that narrowing criteria "had been laid out by [the Georgia Supreme Court] in the *Harris* [*v. State,* 237 Ga. 718, 230 S.Ed.2d 1 (1976)] and *Blake* [*v. State,* 239 Ga. 392, 236 S.Ed.2d 637 (1977)] cases," it concluded that the Georgia Supreme Court had not applied its own restrictive construction of (b)(7) in Godfrey's case and therefore vacated his death sentence. (Notably the crucial limiting criteria in the *Blake* and *Harris* cases, which alone save the Georgia statute as construed, rely heavily upon the final phrase of (b)(7) - "aggravated battery to the victim." That phrase is altogether absent from the Missouri statute in issue here.)

Similar narrowing and limiting constructions have characterized the approach of other state courts. For example, the State of Alabama in *Jacobs v. State,* 361 So.2d 607, 633 (Ala. Crim. App. 1977), *aff'd*, 361 So.2d 640 (1978); the State of Nebraska, in *State v. Rust,* 197 Neb. 528, ____ ,250 N.W.2d 867, 881 (1977); and the State of North Carolina, in *State v. Goodman,* ____ N.C. ____, ____, 257 S.E.2d 569, 585 (1979) have all adopted constructions limiting their equivalent statutory aggravating circumstances to "conscienceless or pitiless crime[s] which [are] unnecessarily torturous to the victim." The State of Virginia and the State of Arizona have engaged in similar attempts to limit the sweep of their statutes. *Smith v. Commonwealth,* ____ Va. ____ , 248 S.E.2d 135, 149 (1978) and *State v. Madsen,* 609 P.2d 1046 (1980). The Missouri Supreme Court's refusal to limit or direct the construction to be given subsection .2(7) allows a jury to again speculate as to the meaning and construction to be given to that phrase without guidance from the Court.

The Louisiana Supreme Court, faced with the inclusion of equivalent language as a circumstance of the substantive criminal offense of capital murder under a prior statute[18] went further than its sister states, holding that "the potential for abuse in making heinousness, atrociousness, or cruelty an element of the offense is both readily apparent and virtually unlimited. . . .[T]hese terms are too vague to serve as constitutionally adequate elements. . . [and therefore] offen[d] the state constitutional guarantees of due process and fair trial." *State v. Payton,* ____ La. ____ , 361 So.2d 866, 871 (1978); see also *State v. Culberth,* No. 66728 (La. Sup. Ct., Nov. 10, 1980). The First Appellate District Court of Appeals of California has reached a similar conclusion concerning a California statutory "special circumstance" which appears plainly to have incorporated into its statutory language the limiting construction placed by the Florida Supreme Court on its similar statute.[19] *People v. Superior Court,* 105 Cal. App.3d 365, 164 Cal. Rptr. 210 (Cal. Ct. App. 1st Dist.) vacated and remanded sub. nom. *Calif. v. Superior Ct.,* ____ U.S. ____ , 49 U.S.L.W. 331 (U.S., Nov. 4, 1980).

In sum, both this Court and the appellate courts of a significant number of states have recognized the inherent

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[18]Under La. Rev. Stat. 14:30.1(B), enacted in 1977, a murder committed with intent but without any aggravating circumstances constituted second degree, or noncapital murder. See *State v. Payton,* ____ La. ____ , 361 So.2d 866, 869-71 (1978).

[19]Under Cal. Penal Code § 190.2(a)(14) the jury may consider as a special circumstance that

> "[t]he murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless or pitiless crime which is unnecessarily torturous to the victim."

vagueness and overbreadth of statutory aggravating circumstances such as Missouri's subsection .2(7) unless those statutes have been carefully limited by judicial construction. The Missouri Supreme Court, however, expressly declined either "to tailor. . .its law" or "to define the crimes for which death may be the sentence in a way that obviates 'standardless sentencing discretion.' " *Godfrey v. Georgia, supra,* 64 L.Ed.2d at 406. Instead, the Missouri Supreme Court erroneously concluded from this Court's discussion in *Gregg* that its own statutory aggravating circumstance is not "so wanting in precision that it rendered the capital sentencing procedure capable of arbitrary and capricious decision." *Westfall v. Mason, supra,* at 917 (J.A. 94-95) and has confidently asserted:

> We see no reason to find that our almost identical statutory provision violates the fourteenth amendment particularly when the statute and its application is subject to mandatoty review by the Missouri Supreme Court in all capital cases. *Id.*

The Missouri court's reliance upon its appellate authority to correct misapplication of subsection .2(7) is beside the point, however, for this Court clearly insisted in *Godfrey,* that it is "the sentencer's discretion" that must be channeled "by 'clear and objective standards' that provide 'specific and detailed guidance' " to the trial jury. *Godfrey v. Georgia, supra,* 64 L.Ed.2d at 406. The inherent constitutional deficiencies of subsection .2(7) are not remedied by the Missouri Supreme Court's promise of corrective appellate intervention, if, as seems certain, Missouri trial juries impose arbitrary death sentences under this subsection because of the absence of legislative or judicial guidance.

This Court has consistently condemned statutes which "licens[e] the jury to create its own standard in each case." *Herndon v. Lowry,* 301 U.S. 242, 263 (1937); *e.g., United States v. L. Cohen Grocery Co.,* 255 U.S. 81 (1921);

Lanzetta v. New Jersey, 306 U.S. 451 (1939); *Cox v. Louisiana,* 379 U.S. 559 (1965); *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966); *Coates v. City of Cincinnati,* 402 U.S. 611 (1971); *Papachristou v. City of Jacksonville,* 405 U.S. 159 (1972); *Grayned v. City of Rockford,* 408 U.S. 104 (1972); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973); *Smith v. Goguen,* 415 U.S. 566 (1974). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminating application." *Grayned v. City of Rockford, supra,* 408 U.S. at 108-09. It is that very danger, intensified in a capital case because of the Eighth Amendment's proscription against arbitrary capital sentences, which the Missouri statute requires Petitioner and other capital defendants to endure.

Moreover, the State's attempted application of subsection .2(7) to the facts of this case is sufficient to demonstrate that, without legislative or judicial guidance, the aggravating circumstance will inevitably be abused. The victim in this case was found in a wooded creek several days after she had been kidnapped. Others who had been present in the victim's home at the time of the kidnapping were left unharmed. The only evidence of physical trauma to the victim was a slight superficial cut on her forehead. There was no evidence of rape, molestation, debasement, abuse or torture. The medical examiner testified that the cause of death, to a reasonable medical certainty, was drowning.

Any such limited construction or guidelines for the jury were denied to the Petitioner in his trial because trial court in its instruction (J.A. 23) omitted any reference to torture leaving the jury with a jumble of "synonyms of equal or

greater uncertainty."[20] See *People v. Superior Court, supra.*[21] Without question, requiring a jury to find that the offense "involved torture" clarifies and enlightens the construction to be given to the phrase "depravity of mind." These phrases, while not identical in meaning, can and should be construed to be identical in degree.

To apply subsection .2(7) to the facts of this tragic but unextraordinary crime is to transform Missouri's statutory aggravating circumstance into an *omnium gatherum,* a circus tent which will cover any murder and which seeks to drag the law back to where it was before *Furman v. Georgia.* Both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment prohibit that result and require

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[20]We append a small glossary of the statutory terms as defined in Webster's New Collegiate Dictionary, B. & C. Merriam Co., 1961.

Outrage: (1) Extravagant or violent misdoing; wrong done to persons or things.

Wanton: (1) Orig., undisciplined; unruly. (4) Marked by arrogant recklessness of justice, of the feelings of others, or the like.

Vile: (2) Morally base, wicked, sinful—(4) Loosely, objectionable for any reason; bad; as vile weather.

Horrible: Exciting, or tending to excite, horror; dreadful; shocking.

Horror: A painful emotion of fear, dread and abhorrence; great aversion and repugnance.

Inhuman: (1) Destitute of human or humane feeling; cruel; brutish. (2) Unlike what is normally human; nonhuman.

Humane: (1) Having feelings and inclinations creditable to man; kind; benevolent.

Depravity: (1) State of being depraved; corruption.

Depraved: Characterized by corruption; esp. perverted, evil.

Corruption: (1) A corrupting, or state of being corrupt; as (a) Decay (b) Depravity; impurity (c) Bribery.

Corrupt: (2) Changed from a state of uprightness, correctness, truth, etc., to a bad state; depraved.

[21]On June 26, 1980 by Per Curiam order the Supreme Court of California denied the Attorney General's Petition for Review.

the Court to declare Missouri Rev. Stat. §5.3.012.2(7) vague and overbroad on its face.

Petitioner also challenges on its face subsection .2(1) of Mo. Rev. Stat. §565.012, which makes it an aggravating circumstance if "[t]he offense was committed. . .by a person who has a substantial history of serious assaultive criminal convictions." This subsection is virtually identical to Ga. Code Ann. §27-2534.1(b)(1)[22] which, as the Court noted in *Gregg,* had been held "impermissibly vague in *Arnold v. State,* 236 Ga. 534, 540, 224 S.Ed.2d 386, 391 (1976), because it did not provide the jury with 'sufficiently "clear and objective standards." ' " *Gregg v. Georgia, supra,* 428 U.S. at 202.

The imprecision of these guidelines becomes apparent when they are viewed in light of the evidence to substantiate this instruction received by the jury at the penalty phase of Petitioner's first trial. The jury was advised of two thirteen year old convictions: kidnapping and armed robbery. No other instruction was given to the jury and it was left to it, in its unguided discretion, to define what constituted a "substantial history" and what a "serious assaultive criminal conviction" was. Clearly, if the legislature had intended that two convictions would amount to a "substantial history" they could have said so using phraseology such as "The defendant has been conficted of more than one serious assaultive crime."

Although this point was raised, (J.A. 72) the Missouri Supreme Court did not address this contention in its opinion,

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[22]Ga. Code Ann. §27-2534.1(b)(1) reads in relevant part as follows:

(1). . .the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

and therefore, it obviously has set no judicial limit on the reach of that aggravating circumstance. Under such circumstances, the Eighth and Fourteenth Amendment considerations which invalidate subsection .2(7) suffice to render subsection .2(1) facially unconstitutional as well.

POINT IV

PERMITTING THE STATE OF MISSOURI TO SEEK THE PENALTY OF DEATH AT PETITIONER'S RETRIAL, AFTER THE JURY AT HIS FIRST TRIAL RETURNED A SENTENCE OF LIFE IMPRISONMENT ONLY, UNCONSTITUTIONALLY CHILLS THE EXERCISE OF HIS RIGHT TO TRIAL BY JURY AT THE SECOND TRIAL

If the State of Missouri is permitted to seek the death penalty at Petitioner's second trial, he will have the option of avoiding a death sentencing by waiving his Sixth Amendment right to a trial by jury. Under this Court's decision in *North Carolina v. Pearce,* 395 U.S. 711, 726 (1969), a *judge* is flatly prohibited from imposing a sentence more severe than the one meted out at the first trial, unless there are reasons for a higher sentence "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original proceeding." As noted earlier, the State has never contended that such reasons are present in this case. (J.A. 62, 69).

Missouri law permits judicial capital sentencing in "cases tried before a judge." Section 565.006.2 R.S.Mo. (1978). Hence, to come within the doctrine of *Pearce* Petitioner must waive his right to a jury not only at the sentencing phase but also at the guilt trial. Under *Jackson v. United States,* 390 U.S. 570 (1968), the state may not constitutionally subject Petitioner to such a choice.

We recognize in a footnote of *Chaffin v. Stynchcombe,* 412 U.S. 17, 33 n.21 (1973), this Court appeared to reject a contention analogous to the one set forth above.[23] However, the court in *Chaffin* noted that it is usually open to "considerable speculation" whether even under *Pearce* the judge "may or may not give a sentence as high as the jury might have." *Ibid.* Here, there is no room for such speculation; the State's concession "peculiarly insur[es] that. . . [if petitioner] waive[s] a jury in favor of a bench trial, . . .[he cannot] be sentenced to death. . ." *Lockett v. Ohio,* 438 U.S. 586, 618 (1978) (concurring opinion of Blackmun, J.). Furthermore, *Chaffin* was not a case of a defendant actually sentenced to death by a jury under circumstances where the judge could have imposed no greater sentence than life imprisonment. In this case, Petitioner faces precisely that predicament. If he forfeits his Sixth Amendment right to a jury upon re-trial, he "absolutely precludes imposition of the death penalty." *Lockett v. Ohio, supra,* 438 U.S. at 618 (concurring opinion of Blackmun, J.). *Jackson* clearly prohibits such a result. See *Corbitt v. New Jersey,* 439 U.S. 212, 217 (1978) (rationale of Jackson applies where waiver of a constitutional right "avoids any possibility of the death penalty's being imposed").

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[23]The argument was not, however, developed in the briefs in *Chaffin* and counsel for Chaffin merely "touched on it briefly" in argument before this Court. *Ibid.*

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Missouri should be reversed.

Respectfully submitted,

/s/ Richard H. Sindel

RICHARD H. SINDEL
15A N. Meramec, Suite 200
Clayton, Missouri 63105
(314) 721-6040
Attorney of Record

GAIL GAUS
E. EUGENE OVERALL
Attorneys for Petitioner

APPENDIX

AMENDMENTS TO THE UNITED STATES CONSTITUTION

ARTICLE V

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal procecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, when district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

ARTICLE XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any state, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies

thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

REVISED STATUTES OF MISSOURI, 1978

565.001. Capital murder defined.-Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

565.006. Verdict as to guilt when rendered-finding of guilt, effect of-presentence hearing, admissible evidence-penalty, when imposed-reversible error, effect of .-1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider consideration of punishment, and by their verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment, and by its verdict ascertain, whether the

defendant is guilty of capital murder, murder in the first degree, murder in thesecond degree, manslaughter, or is not guilty of any offense.

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in section 565.012 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

3. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

565.012. Evidence to be considered in assessing punishment in capital murder cases.-1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence.

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence.

(3) Any mitigating or aggravating circumstances otherwise authorized by law, and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstnaces shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a grat risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder

for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

California Penal Code §190.2-Death penalty or life imprisonment without parole; special circumstances

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

Florida Statute Ann. §921.141-Recommendation to mercy; procedure when persons convicted of capital felony

(5) Aggravating circumstances.-Aggravating circumstances shall be limited to the following:

(c) The defendant knowingly created a great risk of death to many persons.

(h) The capital felony was especially heinous, atrocious, or cruel.

Georgia Code Ann. §27-2534.1-Mitigating and aggravating circumstances; death penalty

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instaructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Louisiana Revised Statute 14:30.1-Second degree murder

Second degree murder is:

B. The killing of a human being when the offender has a specific intent to kill, under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure.

MISSOURI
SUPREME COURT RULES

Rule 28.02(e) Violation of Rule-Effect. Giving or failing to give an instruction or verdict form in violation of this Rule or any applicable Notes on Use shall constitute error, its prejudicial effect to be judicially determined.

Rule 28.02(f) Procedure for Marking Instructions. At the close of the evidence the court shall call a conference of counsel for the purpose of considering instructions and verdict forms requested by counsel as well as those which under the Rules the court proposes to give, whether requested or not. MAI-CR 2.01, 2.02, and 2.03 and all other instructions to be given to the jury at the close of all the evidence shall be numbered consecutively and in such order as the court shall determine unless otherwise instructed in approved Notes on Use.

All original written requests for instructions and verdict forms which are requested but refused shall be so marked by the court, identified alphabetically, and filed and shall be kept as a part of the record of the case. The court shall dictate into the record which party requested each instruction and verdict form given or refused and which instructions and verdict forms were given on the court's own motion.

Whether requested or not, the court shall see that a set of all necessary verdict forms is ready for submission to the jury.

The original of all numbered instructions and all verdict forms shall be handed to the jury for its use during its deliberation and shall be returned to the court and filed at the conclusion of the jury's deliberation.

No. 79-6740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT BULLINGTON,
Petitioner,

v.

STATE OF MISSOURI
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR THE RESPONDENT, STATE OF MISSOURI

JAMES J. COOK
Assistant Prosecuting Attorney

HONORABLE GEORGE R. WESTFALL
Prosecuting Attorney
St. Louis County, Missouri

MARK A. MILLER
Assistant Prosecuting Attorney
7900 Carondelet
Clayton, Missouri 63105
(314) 889-2600
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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BRIEF FOR THE RESPONDENT, STATE OF MISSOURI

JURISDICTIONAL STATEMENT

Respondent adopts Petitioner's Jurisdictional Statement with the following exception: Petitioner's Points concerning the vagueness of the aggravating circumstances here involved are not properly before the Court at this time because of lack of finality.

STATEMENT OF THE CASE

On September 3, 1977, Pamela Sue Wright, then 18 years old, lived with her mother, sister and brother in a small house in suburban St. Louis County. Late that evening a white male broke into the basement and then proceeded into the kitchen

flourishing a shotgun. He directed Mrs. Wright and her son to lie on the kitchen floor. They were blindfolded and their hands and feet bound. Pamela's sister was not at home; nor her father who had died about a year earlier.

The intruder made certain statements to the family and then left with Pamela. After the family heard a vehicle drive off from the front of the house, they freed themselves and ran to a neighbor to call the police.

Several teenagers reported to police that they had seen a white Chevy Luv pick-up truck parked across the street from the Wright's about the time of the abduction. One of the teen-agers later identified another type of truck as being the one at the scene, but all others stated it was a Chevy Luv. Two adults also said that they saw a white Chevy Luv truck going up the street, at a time very near to the time the intruder was leaving.

Mrs. Wright and her son, John, aged 25, gave a description of the intruder and a composite portrait was drawn. This composite appeared in the newspapers. The description included a hat worn by the intruder.

An anonymous tip sent the police to the place of employment of Robert Bullington. They briefly examined his vehicle, a white Chevy Luv truck. Before they were able to question him, however, he was seen leaving his work area, never to return.

The truck was seized and a subsequent search of the interior revealed one blonde hair adhering to a long cardboard box, behind the seat in the cab of the vehicle. This hair was examined by a St. Louis County Police criminologist and found to be similar in all characteristics to hair later taken from the head of Pamela Wright's body. It was also examined against samples of others who might have had access to the truck and they were found to be dissimilar. Mrs. Wright believed him to be the man but wanted to hear the voice. After hearing at least one other person in the line-up speak, she heard Mr. Bullington speak. At

that point she became very excited and had to be assisted from the room. She identified Bullington as the intruder.

Respondent accepts the Petitioner's statement of the case so far as it relates to the procedural matters after conviction. However, Respondent would add that during the second stage of the trial, evidence was introduced concerning the aggravating circumstances. The facts of the case itself were recalled to the jury and evidence was introduced that Bullington had previously been convicted of *Kidnapping While Armed, Robbery 1st Degree, Burglary 2nd Degree and Stealing,* and *Stealing a Motor Vehicle.* The State was not allowed to introduce any evidence about the facts of these prior convictions. Only the titles of the statutes violated were read to the jury.

Two neighbors of Mr. Bullington, who observed him in his vehicle earlier in the evening of the abduction, had noted that he was wearing a hat; which they felt was unusual for him. They said the hat in the composite was similar to the hat worn by Mr. Bullington.

A Mr. Bernard Gronek sold a shotgun to Mr. Bullington one week prior to the abduction. Mrs. Wright and John have identified a shotgun identical to that sold to Mr. Bullington as looking exactly like the gun used by the intruder. When later arrested and questioned about the gun he bought from Mr. Gronek, Mr. Bullington stated that he had thrown it into the river.

After leaving his place of employment, Mr. Bullington next appeared in Guymon, Oklahoma, hitchhiking into town. He took a job with a local drilling company, but left town the day before his first paycheck. Before he left he told the secretary at the company office that he had to leave because the police would be looking for him. When asked why he didn't stop running and straighten out his problem, he stated that, for what he had done, he would have to "pay with his life."

Approximately seven days after she was abducted, Pamela Wright's body was found floating in a creek a few miles from her house and about a mile from Mr. Bullington's house. This creek was in a heavily wooded area. The body was clad only in jeans; her blouse was missing.

The doctor who performed the autopsy ruled that death was by drowning and that it takes at least four minutes for someone to die from drowning. The creek, both where she was found as well as upstream, is shallow. Although she had on no shoes or socks when found, and the area is very rocky, there were no marks on the bottom of her feet. She had a superficial laceration on her forehead. Decomposition was such that evidence of sexual assault was impossible to determine.

Time of death was determined to be somewhere within a two or three day period beginning a day or so after she was abducted. The abduction took place on a Saturday evening. Robert Bullington was at work on Tuesday, Monday being a holiday. Tuesday was the day he fled and did not return.

Robert Bullington was later arrested in California and returned to St. Louis. A line-up was held and John Wright identified him by sight.

SUMMARY OF ARGUMENTS

Point I

The Double Jeopardy Clause has never been held to bar the retrial of a defendant after he had achieved a successful appeal. *U.S.* v. *Ewell,* 383 U.S. 116, 121 (1965). A contrary rule would allow guilty persons to escape justice and prevent appellate courts zealously protecting the rights of defendants at trial. *U.S.* v. *Tateo,* 377 U.S. 463, 464 (1964). Similarily, it has been held that this Fifth Amendment protection does not prohibit an enhanced sentence upon reconviction. *North Carolina* v. *Pearce,* 395 U.S. 711, 719 (1968).

Petitioner in this cause contends that the State of Missouri is barred under Double Jeopardy principles from again seeking the death penalty because capital murder is in essence two separate criminal offenses: capital murder punishable by death and capital murder punishable by life imprisonment. A simple reading of the Missouri Capital Murder Statute reveals that there is but one crime of capital murder with a range of punishment of life imprisonment or death. Mo. Rev. Stat. §565.001. That the capital murder proceeding is bifurcated in no way changes this result. Bifurcation is a procedural device employed to protect against arbitrary and capricious imposition of the death penalty. It was given explicit approval by this Court in *Gregg. Gregg* v. *Georgia,* 428 U.S. 153, 194-195 (1976). It is not an attempt to create greater and lesser included offenses.

This Court, in *Stroud* v. *U.S.,* 251 U.S. 15. (1919), had the opportunity to address the very issue it is now asked to decide. In *Stroud,* the majority allowed a jury-imposed death sentence to be imposed after a prior jury had given a sentence of life. The Court recognized that the convictions in both cases were the same, only the punishment had been changed. *Stroud* v. *U.S.,* 251 U.S. at 17-18. The argument that enhanced sentencing was barred by the Double Jeopardy Clause was rejected as it has

been in subsequent cases. 251 U.S. at 17-18. Applying *Stroud* to this case, it cannot be doubted that the State of Missouri can again seek the death penalty.

Petitioner also relies on the principles of *Ashe* v. *Swenson,* 397 U.S. 436 (1970). *Ashe,* however, is not applicable to this case. *Ashe* requires that the Court consider whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to preclude from consideration. 397 U.S. at 443. A rational jury, could easily impose a life sentence in response to a plea of mercy and not the evidence. Additionally, *Ashe* calls for a final judgment. There is not final judgment in this case. 397 U.S. at 443. Moreover *Ashe* was aimed at curbing abuses in the area of multiple prosecutions. Such abuses are not present in the case a bar.

Likewise, the Due Process Clause presents no bar to the State of Missouri seeking the death penalty at petitioner's second trial. *Chaffin* v. *Stynchombe,* 412 U.S. 17 (1973) held that the restrictions placed on enhanced sentencing in *North Carolina* v. *Pearce,* 395 U.S. 711 (1968) apply to judge sentencing and not to jury sentencing. The *Chaffin* decision, refusing to extend the *Pearce* rationale to jury sentencing, found that the possibilities of vindictiveness present in *Pearce* were not present where the jury imposed sentence. *Chaffin* v. *Stynchombe,* 412 U.S. at 27-28.

Point II

It is not disputed that the jury in the first trial imposed on petitioner a sentence of life. This fact does not however lead to the conclusion that a death penalty imposed by a second jury is necessarily arbitrary and capricious or excessive and disporportionate. Missouri has adopted a capital murder statutory scheme very similar to the one given approval by this Court in *Gregg. Gregg* v. *Georgia,* 428 U.S. at 162-168, 188-207. The Missouri provisions, when reviewed under the dictates of *Gregg,* make it

clear that the death penalty can be imposed in a wholly constitutional manner. Contrary to petitioner's assestions, the isolated jury decision to afford mercy does not render unconstitutional death sentences imposed under a system which negates any substantial risk of arbitrariness or caprice. *Gregg* v. *Georgia,* 428 U.S. at 203. A necessary corollary of this is that the isolated decision of a jury to afford mercy does not render disproportionate and excessive death sentences imposed on defendants under a wholly constitutional capital sentencing procedure. Additionally, petitioner's position misconstrues the meaning of disproportionality. Disproportionality is found by comparing the results in two cases, not by comparing what two different juries do in a single case.

Point III

The possibility that a jury might impose a higher sentence does not impermissibly chill a defendant's right to seek a trial by jury at his second trial. *Chaffin* v. *Stynchombe,* 418 U.S. at 33 footnote 21. The *Chaffin* Court recognized the choice confronted by the defendant was subject to considerable speculation and therefore refused to intrude into this valid and legitimate state interest. *Chaffin* v. *Stynchombe,* 418 U.S. at 33 footnote 21. Similarly as this Court recognized, not all government imposed choices in the criminal process which have the effect of discouraging the exercise of constitutional rights are constitutionally forbidden. *Crampton* v. *Ohio,* 402 U.S. 185, 213 (1971).

Point IV

Petitioner in this cause has raised issues in this cause addressing whether the aggravating circumstances plead in this case are unduly vague and overbroad. This Court in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) reviewed the finality requirements of 28 U.S.C. §1257. A review of this case reveals that the present controversy does not fit into any of the

categories of cases enumerated by the Court where federal jurisdiction has been assumed even though further state proceedings are pending. A full trial is yet to be had in this matter and the Missouri Supreme Court has not had the opportunity to fully review the language presently under attack. It would appear therefore, that this Court should, in order to avoid unnecessary federal-state conflict, defer decision until such time that the Missouri Supreme Court has rendered a decision.

The merits of this issue are governed by the decisions in *Gregg* v. *Georgia* and *Godfrey* v. *Georgia,* 100 S.Ct. 1759 (1980). In *Gregg* this Court held language very similiar to that found in R.S.Mo. 565.012.2(7) not to be facially vague. *Gregg* v. *Georgia,* 428 U.S. at 201. Likewise, the *Godfrey* decision did not hold the *Georgia* wording vague, rather it attacked the interpretations and applications given the language by the Georgia Supreme Court.

The issue whether the language of Mo. Rev. Stat. §565.012.2(1) is facially vague is also governed by the dictates of *Gregg*. *Gregg* looked to see whether the statute avoids standardless sentencing on the part of jury. 428 U.S. at 196. A simple reading of this statute reveals that it provides the jury "with objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death." *Woodson* v. *North Carolina,* 428 U.S. 280, 303 (1976). Moreover, this Court found in *Godfrey* that almost identical language was considerably more specific or objectively measurable than other language it held facially valid. *Godfrey* v. *Georgia,* 100 S.Ct. at 1762, footnote 2.

ARGUMENT

Point I

The State Of Missouri Is Not Barred By Either The Double Jeopardy Clause And The Principles Of Collateral Estoppel Embodied Therein Or The Due Process Clause From Seeking The Death Penalty At Petitioner's Second Trial After The Jury At His First Trial Sentenced Him To Life Imprisonment Only.

A. Double Jeopardy

It is a well-settled principle of constitutional law that a defendant can be retried after a successful appeal of his underlying conviction, *U.S.* v. *Ball,* 163 U.S. 622 (1895), *U.S.* v. *Ewell,* 383 U.S. 116, 121 (1965). This Court has seen the permissibility of retrial as serving two competing interests. First is society's interest in punishing those guilty persons who secure a successful appeal. Second, it assures a defendant a fair trial for

> it is doubtful that an appellate court would be as zealous as they are now in protecting against the effects at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. *U.S.* v. *Tateo,* 377 U.S. 463, 466 (1964).

Thus a defendant who is retried after he has sought and achieved a successful appeal is not placed in jeopardy within the meaning of the Fifth Amendment. *Stroud* v. *United States,* 251 U.S. 15, 18 (1919).

Similiarly well-settled is the principle that the Double Jeopardy Clause presents no bar to an enhanced sentence upon reconviction. *North Carolina* v. *Pearce,* 395 U.S. 711, 719 (1968), *Chaffin* v. *Stynchombe,* 412 U.S. 17, 23-23 (1972). As pointed out by the Court in *Pearce,* a contrary holding would cast grave doubt on the principle enunciated in *Ball* and upon the unbroken line of decisions upholding that principle for almost seventy-five years. *North Carolina* v. *Pearce,* 395 U.S. at 721. Thus, the

Court reaffirmed these earlier cases and specifically declined to depart from their holdings.

Petitioner in this cause does not assert that the State of Missouri is barred from retrying him for the crime of capital murder Mo. Rev. Stat. §565.001 (1978). Rather, it is the dubious contention of the appellant that the Double Jeopardy Clause bars the state from again seeking the death penalty because the punishment assessed determines whether there was a conviction of capital murder punishable by life imprisonment or capital murder punishable by death. Is is petitioner's belief, therefore, that he was convicted of capital murder punishable by life imprisonment and acquitted of capital murder punishable by death. A close examination of the relevant statutes reveals that petitioner's position cannot be sustained.

The State of Missouri in response to *Furman* v. *Georgia,* 408 U.S. 238 (1972) and *Gregg* v. *Georgia,* 428 U.S. 153 (1976) enacted its present capital murder statute Mo. Rev. Stat. §565.001 - §565.016 (1978).[1] This statute is virtually identical to one given approval by this Court in *Gregg*. Like the Georgia statutory scheme, it calls for a bifurcated proceeding wherein guilt is determined at the first stage and the penalty at a second, separate hearing.[2] To impose the death penalty, the jury must find beyond a reasonable doubt, that an aggravating circumstance exists.[3] Although it is necessary that a jury make a specific finding that an aggravating circumstance does exist before it can impose the death penalty, there is no requirement that they find no aggravating circumstances exist to impose a

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[1] All statutes cited are set out in full in Respondent's Appendix at pp. A-1-A-6.

[2] Mo. Rev. Stat. §565.006.

[3] Mo. Rev. Stat. §565.012.

life sentence.[4] Thus, given the dictates of *Gregg*, the Missouri capital murder statute, patterned as it is after the Georgia scheme, suffers no constitutional infirmity.

The statute which defines the crime of capital murder states in pertinent part:

> Any person who unlawfully, willfully, knowingly, deliberately and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.[5]

It is clear, from reading the statute, that there is but one crime of capital murder. As was pointed out by the Missouri Supreme Court, nowhere is it stated, nor is it implied that the Missouri Legislature intended to create the greater offense of capital murder with death and the lesser-included offense of capital murder with life imprisonment.[6] Rather, it has created the single crime of capital murder and has set the range of punishment at life imprisonment with no parole for fifty years or death.

It would be a novel and unfounded legal proposition to assert that a First Degree Robbery conviction with ten years imprisonment is a lesser included offense of First Degree Robbery with

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[4] Mo. Rev. Stat. §565.012. See also excerpts from Jury Instructions and Verdict, Instructions 36-39 (J.A. 24-27).

[5] Mo. Rev. Stat. §565.001.

[6] The Missouri Supreme Court stated, "We are untilling and indeed are unauthorized to indulge in such friction. It is not our prerogative to create separate crimes from those defined by statute. The simple fact is that capital murder under §565.001 RSMo 1978 is a single crime with range of punishment at life imprisonment without probation or parole for 50 years to the death penalty. Respondent's argument not only runs contrary to the decided cases, it ignores the statutory sections which define capital murder, prescribe the punishments for that offense and detail the procedures for imposing those punishments. As noted above, there is but one crime defined as capital murder and the acts proscribed are specific in §565.001. It is for that offense Bullingtson stood convicted following the first trial and it is for that offense he remains charged and awaits trial. (J.A. 85).

fifteen years imprisonment. This, however, is what logically flows from Petitioner's position. In short, such a position uses the imposition of sentence as the deciding factor in judging what constitutes jeopardy. This Court has never followed such a strained interpretation of the Double Jeopardy Clause nor used it to reach such a specious conclusion. *North Carolina* v. *Pearce.*

Petitioner presses the contention that bifurcation alone creates greater and lesser included offenses of capital murder. To begin, this ignores the plain fact that the sentencing portion of the trial is a part of the trial itself. There is but one trial broken into two stages. The statutory language allows no other conclusion.[7] More importantly, such a position misreads the purpose of bifurcation in the capital murder trial. As this Court stated:

> The concerns expressed in Furman that the penalty of death should not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance. As a general proposition, these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information. *Gregg* v. *Georgia,* 428 U.S. at 195.

Thus it becomes apparent that the purpose of bifurcation is to insure that the constitutional rights of a defendant are protected in a capital murder case. It is an attempt to make certain that any death penalty imposed is done so under the most sure of conditions and well within constitutional mandates. The bifurcated procedure enacted by the Missouri legislature seeks to

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[7] Mo. Rev. Stat. §565.006 2

allow "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death" *Woodson* v. *North Carolina,* 428 U.S. 280, 303 (1976) and to provide "guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary." *Gregg* v. *Georgia,* 428 U.S. at 194-195. In short, the second stage of a bifurcated trial is no more than a procedural device created to protect the convicted defendant.

Petitioner relies heavily on the holding in *Green* v. *U.S.,* 355 U.S. 184 (1957). In that opinion it was held that:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.... 355 U.S. at 187-188.

Further, the Court stated that the defendant "may only be forced to run the gauntlet once." 355 U.S. at 190. This case is, however, easily distinguishable from the one at bar. First, and most importantly, in *Green,* the defendant was charged with arson and first degree murder but was convicted of arson and second degree murder, a lesser included offense. Petitioner in this cause has not been acquitted of any crime. He was convicted of capital murder. At his second trial he will be tried for capital murder. Secondly, the State of Missouri is not forcing the defendant to twice run the gauntlet; it is at his own behest that a second trial is being had. See *North Carolina* v. *Pearce,* 395 US at 721.

It is of no small import that this Court has had occasion to decide the very question now at bar. In *Stroud* v. *United States* 251 U.S. 15 (1919), the defendant was convicted of first degree

murder and sentenced to death. After a successful appeal, he was again tried and convicted of first degree murder but was not given a capital sentence. A second appeal was taken and the defendant was again successful. The third trial resulted in conviction with a death sentence being imposed. The Court in *Stroud* affirmed the sentence and stated:

> From what has already been said it is apparent that the indictment was for murder in the first degree....Each conviction was for the offense charged. It is true that upon the second trial the jury added without capital punishment to its verdict, and sentence of life imprisonment was imposed....The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder. *Stroud* v. *United States,* 251 U.S. at 17-18.

The opinion further held that "the protection afforded by the Constitution is against a second trial for the same offense..." 251 U.S. at 18. The holding of *Stroud,* despite the petitioner's suggestion, is sound and principled. It is recognized, as *Pearce* and *Chaffin* did later, that the Double Jeopardy Clause protects against further prosecution for the same offense, and not enhanced punishment at retrial. Bifurcation in no way shakes the solid foundation of this reasoned opinion. As has been shown, bifurcation is a device which has been created to protect the defendant. It is not a new branch of double jeopardy jurisprudence. This latter notion is borne out by *Stroud,* for implicit in that opinion is that the underlying conviction and not the punishment imposed dictates whether the double jeopardy prohibitions have been ignored.

Applying *Stroud* to the case at bar, it becomes clear that the State of Missouri can again seek the death penalty. Petitioner was convicted of capital murder at his first trial. The fact that a sentence of life imprisonment was imposed does not render it any less a conviction for capital murder. *Stroud* v. *U.S.* 257 at

18. It having been established that the Double Jeopardy Clause presents no bar to enhanced punishment, a capital sentence can be imposed against the petitioner at his second trial. *Stroud* v. *U.S.*

Petitioner in this cause also asserts that the issue of punishment has been litigated and imposed and remains undisturbed by the granting of a new trial. Petitioner relies on the collateral estoppel principles set forth in *Ashe* v. *Swenson,* 397 U.S. 436 (1970). This is a variant of the Fifth Amendment Double Jeopardy argument. In support of this position, petitioner points to the supposed findings of the jury at the second stage of the trial and to respondent's statement that the same evidence presented at the first sentencing hearing would be presented at the second.

Ashe held that the principles of collateral estoppel are embodied in the Fifth Amendment's prohibition against Double Jeopardy. Simply, this means "that where an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated in any future lawsuit." *Ashe* v. *Swenson,* 397 U.S. at 443. The Court is *Ashe* stated:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of the 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe* v. *Swenson,* 397 U.S. at 443-444.

An examination of the *Ashe* decision reveals its inapplicability to the present fact situation. First the *Ashe* rationale calls for a valid and final judgment. This case has neither. At petitioner's initiative a new trial is being had. The first trial is now a nullity, without any legal effect. Petitioner, however, seeks to pick and choose between those issues which are to be retried. This position ignores the premise that the original conviction, at the defendant's behest, has been wholly nullified and the slate wiped clean. *North Carolina* v. *Pearce,* 395 U.S. at 721. Secondly, the *Ashe* test requires that a court consider whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to preclude from consideration. *Ashe* v. *Swenson,* 397 U.S. at 443. An examination of the jury's finding in this case reveals that a jury could have based its verdict on something other than the absence of aggravating circumstances. There is no requirement in Missouri that a jury make a specific finding that no aggravating circumstance existed to impose a life sentence.[8] Clearly, the first jury might have imposed life imprisonment in response to defendant's plea for mercy rather than a finding of no aggravation. (J.A. 88). Thus, it cannot be said with any certainty, especially given the nature of this case, that the jury found that no aggravating circumstance existed. Thirdly, petitioner's argument misses the purpose of the *Ashe* rationale. *Ashe* sought to curb abuses arising in the multiple prosecution situation. Those abuses are not present here. Rather, petitioner faces but one prosecution on the charge of capital murder. Lastly, *Ashe* looked to convictions, not punishment.[9]

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[8] See Missouri Approved Instructions, Excerpts from Jury Instructions, (J.A. 24-27).

[9] Petitioner's argument, if accepted, would allow him to do what he is unable to achieve under a standard Double Jeopardy analysis; that is, it would allow for a 5th Amendment finalty to the imposition of sentence. Further, it would call for, at least, an implicit overruling of *Stroud* v. *U.S., North Carolina* v. *Pearce,* and *Chaffin* v. *Stynchcome, supra.*

The absence of any new evidence for presentation at the new sentencing proceeding has no bearing on the applicability of *Ashe* to the case at bar. Any second trial will almost inevitably involve the presentation of the same evidence used at the first. The Court in *Ashe* did not hold impermissible the presentation of the same evidence at retrial after a successful appeal. Rather it sought to prohibit the State from trying its case in a "dry run fashion." This problem is not present here. The State of Missouri tried its case at both stages as it would normally do in any trial. It has not been stated nor implied that the original trial was an attempt by the State to test the strength of its case. *Ashe,* 397 U.S. at 477. The reason that it is again putting forth its evidence is simply because the petitioner sought and secured a new trial. See *Stroud* v. *U.S., North Carolina* v. *Pearce.*

It becomes apparent, for the reasons given above, that *Ashe* is inapposite to the situation at bar. (J.A. 88). The rationale of that case sought not to overturn established Double Jeopardy principles, but instead to supplement them in a particular area. The abuses it looked to eliminate are not found in the facts now before the Court and any reliance on its rationale, absent those circumstances, is ill-founded. It follows, therefore, that *Ashe* in no way hinders the State of Missouri from seeking the death penalty at the second trial of petitioner.[10]

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[10] Although not raised specifically in petitioner's brief, mention should be made of the standard of proof at the sentencing stage of the capital trial. This standard, like bifurcation itself, is but another protection afforded the convicted defendant at the capital trial. Like bifurcation, this standard should not be viewed as a means to create two trials or two offenses, but rather as another procedural safeguard. This conclusion is bolstered by the Court's decision in *Profitt* v. *Florida,* 428 U.S. 242 (1976), which allowed a sentencing judge to impose a sentence of death, thus overruling an advisory jury recommendation of life. The judge's decision was judged under a "clear and convincing" standard. Thus, it appears that the "beyond a reasonable doubt" standard is not constitutionally required.

In conclusion, it is clear that the State of Missouri can seek the death penalty at petitioner's second trial without offending long-established double jeopardy principles. The "prohibition is not against being twice punished, but against being twice put in jeopardy." *Price* v. *Georgia,* 398 U.S. 323, 326 (1969). Petitioner was fined and convicted of capital murder, a crime with a range of punishment of life imprisonment without parole for fifty years or death. He was given a life sentence and then sought and won a new trial. The Fifth Amendment prohibition does not bar, after successful appeal, the retrial of a defendant for the crime of which he was convicted, nor does it prohibit enhanced punishment at his second trial. Bifurcation does not change this. Indeed, it would be a strange turn of events if bifurcation, a shield erected to protect the rights of a convicted defendant, was made a sword, piercing the armor of justice.

B. Due Process

The Due Process Clause has been held to bar the imposition of a higher judge-imposed sentence at a second trial after a successful appeal. *North Carolina* v. *Pearce,* 395 U.S. at 723. The Court in *Pearce* feared that increased punishment would be imposed as a penalty against those persons who pursued and won a new trial, 395 U.S. at 723. The imposition of such a punishment, the Court reasoned, would be patently unconstitutional. The majority opinion in Pearce Explained:

> Due Process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. 395 U.S. at 725.

To combat this possibility, a remedy was fashioned which required the sentencing judge, who imposed a higher sentence after the second trial, to affirmatively state why the sentence was increased. 395 U.S. at 726. The majority in *Pearce* held further that the reasons for increased punishment must be based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726. Thus, while higher sentencing by a judge at a second trial after a successful appeal was extremely curtailed, the opinion did not make all higher sentencing a *per se* Due Process violation.[11]

In *Chaffin* v. *Stynchombe,* 412 U.S. 17 (1973), an attempt was made to expand the *Pearce* rationale to jury sentencing. Mr. Justice Powell writing for the majority specifically refused to do so stating:

> While we reaffirm the underlying rationale of *Pearce* that vindictiveness against the accused for having successfully overturned his conviction has no place in the resentencing process, whether by judge or jury, we hold today that due process of law does not require extension of *Pearce*-type restrictions to jury-sentencing. 412 U.S. at 18.

The Court in *Chaffin* explained that the *Pearce* decision was based on the need to protect successful defendants against vindictiveness in the resentencing process. The majority continued, stating:

> Pearce was not written with a view to protecting against the mere possibility that, once the slate is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process. The possibility of a higher sentence was recognized and ac-

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[11] *See also Colten* v. *Kentucky,* 407 U.S. 104 (1972) *Ludwig* v. *Massachusetts,* 427 U.S. 618 (1975)

cepted as a legitimate concomitant of the retrial process. 412 U.S. at 25.

The Court therefore analyzed enhanced sentencing by a jury by inquiring into whether there was the possibility of vindictiveness occasioned in *Pearce*.[12] In so doing, the Court found "the potential for such abuse of the sentencing process by the jury *de minimus* in a properly controlled retrial."[13] The opinion based this finding on the fact that a properly empaneled jury is not informed of the prior case or sentence.[14] The Court also enumerated other factors which distinguished jury from judge resentencing. First, the sentence is not being imposed by the "same judicial authority" whose decisions at trial required reversal. Thus, unlike in *Pearce,* the sentencing authority has no "personal stake" in the first trial nor "the motivation to engage in self-vindication." 412 U.S. at 27. Secondly, a jury unlike a judge is not subject to institutional pressures or interests. Therefore, a jury is unlikely to increase sentencing at a second trial to discourage meritless appeals. 412 U.S. at 27.

Blackledge v. *Perry,* 417 U.S. 21 (1973) reaffirmed the principles of *Pearce* and *Chaffin.* In this case the Court was faced with the question of whether opportunities for vindictiveness on the part of the prosecution were such that a *Pearce*-type rule was warranted. In holding that such a rule was warranted, the

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[12] The facts in *Chaffin* are analogous to the situation at bar. In *Chaffin* the defendant was charged with robbery, a capital offense. The State asked for the death penalty and the jury returned a fifteen year sentence. At the second trial, the death penalty was again sought, with the jury imposing a sentence of life imprisonment.

[13] Petitioner has not asserted that such a jury could be empaneled.

[14] The Court further stated at 26-27 that "it is more likely that the jury will be aware that there was a prior trial, but it does not follow from this that the jury will know whether it resulted in a conviction or mistrial."

Court held it constitutionally impermissible for the State of North Carolina "to respond to the (defendant's) invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo."[15] The Court stated:

> There is, of course no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." We think it clear that the same consideration apply here.

It is important to note that the opinion in *Blackledge* does not expressly address the problem involved where the prosecution seeks a higher sentence at the second trial than it sought at the first trial. Of course, that is not the case here.[16]

A review of this trilogy of cases makes it clear that the Due Process Clause presents no bar to the State of Missouri seeking the death penalty at the second trial. The *Pearce* case is inap-

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[15] In *Blackledge,* the defendant was charged with the misdemeanor of assault with a deadly weapon. He was tried and convicted in the District Court, Division of the General Court of Justice. Defendant, pursuant to statute filed an appeal to the Superior Court. He had an absolute right to this trial de novo. Under North Carolina law, the slate is wiped clean. After filing this notice of appeal, but before the trial, the Prosecuting Attorney sought and received a felony indictment charging the defendant with Assault with a Deadly Weapon with Intent to do Bodily Harm. The defendant plead guilty to the indictment and was sentenced to 5 to 7 years.

[16] Footnote 13 in Chaffin does state that it is desirable that the prosecution seek the same penalty at both trials. The Court felt that this evidenced no vindictiveness on the part of the prosecution.

plicable for the reason that the jury will impose the sentence at the second trial. Similarly, *Blackledge* and its possible applications have no bearing on this case. The State of Missouri sought a capital murder conviction and the death penalty against the petitioner at the first trial and will do so at the second. Thus, it is apparent that the fears of possible vindictiveness by the prosecution found in *Blackledge* are not present.

The controlling principles of law in this case are found in *Chaffin*. *Chaffin*, like the situation at bar, was concerned with the propriety of increased sentencing by a jury upon retrial. The opinion established the principle that there being no likelihood that the jury in the second trial will sentence with vindictiveness, an increased punishment by the jury will not violate the Due Process Clause. 412 U.S. at 27-28. Applying this rationale to the case at bar, it is clear that the imposition of the death penalty by the jury at petitioner's second trial will not result in the violation of any constitutional guarantee. That this is a bifurcated proceeding is of no consequence to applicability of the *Chaffin* decision for, as this Court has recognized bifurcation alone does "not wipe away the fundamental differences between jury and judicial sentencing."[17] 412 U.S. at 28 No. 15.

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[17] In Footnote 15, the Court stated, "While some jury sentencing states have adopted bifurcated jury trials, in which the jury assesses the punishment in a separate proceeding after a verdict of guilty has been rendered (citations omitted) bifurcation alone would not wipe away the fundamental differences between jury and judicial sentencing. It may make little sense to supply the jury with information about the defendant's conduct if the goal of jury sentencing is not necessarily to fit the punishment to the offender, and if the jury is therefore, not concerned about matters considered pertinent to judicial sentencing.

Petitioner and recent court of appeals cases suggest that approximation of the *Pearce* limitations could be realized either by instructing the jury that it may return no verdict higher than the former sentence, or by empowering the judge to reduce the second sentence whenever it exceeds the former sentence (citations omitted). Although these alternatives would provide an absolute protection from the possibility of vindictiveness, they would also interfere with ordinary sentencing discretion in a manner more intrusive than contemplated by *Pearce*.

It must be remembered that the Due Process Clause is not violated by all possibilities of increased punishment upon retrial, "but only those that pose a realistic likelihood of vindictiveness." *Blackledge* v. *Perry,* 417 U.S. at 27. This concern is absent in this case. Petitioner has not asserted, nor is there any reason to believe that petitioner faces a "realistic likelihood" that vindictiveness will assume a role in the jury's sentence. Thus, it would be particularly unfortunate to place such needless contraints upon jury discretion as those urged by petitioner in an area where individualized consideration of each offender is constitutionally required. *Lockett* v. *Ohio,* 438 U.S. 586,604 (1978). Similarily, the establishment of a *Pearce* type rule in the area of jury-sentencing would deliver a severe blow to the legitimate practice of allowing each jury to impose sentence based on its own assessment of the evidence. *Chaffin* v. *Stynchombe,* 412 U.S. at 32.

II

A Sentence Of Death At Petitioner's Second Trial After The Jury At The First Trial Imposed A Sentence Of Life Imprisonment Will Not Violate The Petitioner's Constitutional Right That A Sentence Not Be Excessive And Disproportionate Nor Will It Violate His Constitutional Protection Against Imposition Of The Death Penalty In An Arbitrary And Capricious Manner.

This Court in *Gregg* v. *Georgia,* 428 U.S. 153 (1976) held that the death penalty could be inflicted for the crime of murder. 428 U.S. at 181. Recognizing the uniqueness of the death penalty and its prior holding in *Furman* v. *Georgia,* 408 U.S. 238 (1972), the Court mandated that capital punishment "not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." To minimize this possibility the majority demanded that the discretion of the sentencing authority be suitably directed and limited. 428 U.S. at 188-189.

They would achieve in the name of due process, the substance of the result we have declined to approve under the Double Jeopardy Clause."

The Court in *Gregg* examined the capital punishment procedures enacted in the State of Georgia. In holding that the Georgia statute met the concerns of *Furman* and thus that the sentence of death could be constitutionally imposed in Georgia, this Court pointed to several aspects of the statutory scheme. 428 U.S. at 198,207. First, the Court reviewed, with favor, the bifurcated trial, citing the findings of the drafters of the Model Penal Code. 428 U.S. at 181-193. Secondly, the majority pointed to the list of aggravating circumstances found in the statute and stated that this required the jury "to consider the circumstances of the crime and the criminal before it recommends sentence." 428 U.S. at 196-197. Lastly, the Georgia statute called for automatic appeal of a death sentence to the Supreme Court of Georgia. This was seen as an important additional safeguard against arbitrary and capricious imposition of the death penalty for it required the highest court of that state to review each death sentence and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supported the jury's findings of a statutory aggravating circumstance and whether the sentence was disproportionate compared to those sentences imposed in similar cases. 428 U.S. at 198.

The State of Missouri has adopted a statutory scheme very similar to the one found in Georgia.[18] The Missouri legislature enacted its procedures in response to the directives set forth in Gregg. The Missouri provisions, in order to reduce the likelihood of arbitrary and capricious imposition of the death penalty, call for a bifurcated proceeding.[19] After a finding of guilty, a sentencing hearing is held wherein the jury considers both aggravating and mitigating circumstances as to the of-

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[18] Both states have patterned their procedures after the Model Penal Code (ALI) Proposed Official Draft (1962).

[19] Mo. Rev. Stat. §565.006.

fender and the offense.[20] If the death penalty is imposed, mandatory review is had to the Missouri Supreme Court.[21] It is the duty of that court to determine "whether the evidence supports the jury's or judge's finding of statutory aggravating circumstance" and "whether the sentence imposed is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[22]

It is clear that under the principles set forth in *Gregg,* the death penalty can be imposed in a wholly constitutional manner in the State of Missouri. The statutory scheme allows for consideration of the individual circumstances of each offense and the particular offender. *Woodson* v. *North Carolina,* 428 U.S. at 304; *Lockett* v. *Ohio,* 438 U.S. at 604. Further, as is constitutionally mandated, it gives guidance to the jury and provides it with direction so as to minimize the risk of arbitrary and capricious imposition of the capital sanction.

Petitioner asserts, that because a jury imposed a life sentence at the first trial, a sentence of death at the second would necessarily be imposed in an arbitrary and capricious manner. This argument must fail for it misreads this Court's opinion in *Gregg.* The Supreme Court of Missouri is required by statute to review the jury's finding of an aggravating circumstance. Additionally, that Court must determine whether the sentence imposed by the jury is proportionate to sentences imposed in similar cases. It does not follow that a life sentence imposed by a jury that chooses to show mercy renders unconstitutional death sentences imposed under constitutional procedures. As the Court in *Gregg* explained:

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[20] Mo. Rev. Stat. §565.012.

[21] Mo. Rev. Stat. §565.014.

[22] Id.

> The petitioner next argues that the requirements of *Furman* are not met here because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case. This contention misinterprets *Furman*. Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportionate to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice: *Gregg* v. *Georgia,* 428 U.S. at 203.

Imposition of the death penalty by the jury at petitioner's second trial, therefore, would be permissible given the capital sentencing procedures established in Missouri.

Similarly, the petitioner maintains that because the first jury imposed a life sentence, the imposition of the death penalty at a second trial would necessarily be disproportionate and excessive.

In asserting this proposition, petitioner relies heavily on the fact that the prosecution seeks to introduce the same evidence at the second trial. This argument ignores in the first instance that this Court has held that the death penalty could be imposed for the crime of murder. *Gregg* v. *Georgia,* 428 U.S. at 181. Secondly, this reasoning cuts against the teachings of *Gregg*. The Court in that case stated that "the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." *Gregg* v. *Georgia,* 428 U.S. at 203. A necessary corollary of this is that the isolated decision of a jury to afford mercy

does not make disporportionate and excessive death sentences imposed on defendants under a wholly constitutional capital sentencing procedure.

Moreover, this position misconstrues the meaning of disproportionality. Disproportionality is found by comparing the results of two or more different cases, not by comparing what two different juries do in a single case. *See Ward* v. *State,* 236 S.E.2nd 365, 369 (J. Bowles Dissenting) (GA, 1977). It would go against sound judicial reasoning to compare the finding of the first jury in a case without legal effect with what the second jury could do with the same facts and then decide what is disproportionate. See *Ward* v. *State,* 236 S.E.2d at 369. Not only would a reviewing court be using a void judgment for purposes of comparison, it would be concerning itself with the unanswerable question, "which verdict is correct?" The problem is further complicated by the very real possibility that the first jury, in deeming life imprisonment appropriate, ignored the evidence presented to it. Simply stated, this case cannot be compared against itself for the purposes of disproportionality. Logically, then, it follows that the valid sentence, that is the jury imposed sentence finally left standing in this case, must be the one used for the purposes of comparison. Only then can a reviewing court truly decide whether a sentence is disproportionate within the meaning of *Gregg.*

In conclusion, the imposition of the death sentence by a jury in the second trial will not constitute imposition of the death penalty in an arbitrary or capricious manner nor will it constitute an excessive or disproportionate sentence. As shown above, the Missouri capital sentencing procedures are well within both the mandate and spirit of *Gregg.* The fact that an earlier jury imposed a life sentence is irrelevant to this cause. The State of Missouri should not, therefore, be barred from seeking the death penalty at petitioner's second trial.

III

Permitting The State Of Missouri To Seek The Penalty Of Death After The Jury At His First Trial Returned A Sentence Of Life Imprisonment Does Not Unconstitutionally Chill The Exercise Of The Right To Trial By Jury At His Second Trial.

The question whether imposition of a higher sentence unconstitutionally and thus impermissibly chills a defendant's right to trial by jury is answered by the principles set forth in *Chaffin* v. *Stynchombe,* 412 U.S. (1972). The Court in *Chaffin* stated that absent vindictiveness, higher sentences could be imposed in spite of "whatever incidental effect they might have on the right to appeal."[23] 412 U.S. at 29. Further, the Court, in addressing petitioner's contention that *United States* v. *Jackson,* 390 U.S. 570 (1967) compelled a different result, held that "the Constitution did not forbid all Government-imposed choices in the criminal process that have the effect of discouraging the exercise of constitutional rights." 412 U.S. at 30. The Court continued, quoting *Crampton* v. *Ohio,* 402 U.S. 185, 213 (1971):[24]

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow.... Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose". 412 U.S. at 32.

Recognizing that the inquiry by its very nature, must be made on a case by case basis, the *Chaffin* court indicated that the "threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." 412 U.S. at 32.

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[23] See also *Colten* v. *Kentucky,* 407 U.S. 104 (1972).

[24] See *Mc Gautha* v. *California,* 402 U.S. 103 (1971).

Turning to the case at bar, it becomes clear that the rationale in *Chaffin* is controlling. Here, as in *Chaffin,* the defendant is faced with the possibility that a sentence of death might be imposed at the second trial. Both were faced with difficult choices, but the mere fact that the choices may be difficult does not in an of itself make them unconstitutional. See 412 U.S. at 30. The *Chaffin* majority recognized that jury sentencing, based on each jury's assessment of the evidence is a legitimate practice. 412 U.S. at 32. The fact that as an incidental consequence of this the accused may be required to choose between risking a higher sentence at retrial or waiving his rights, is permissible. This is true whether it is the right to appeal or the right to trial by jury, 412 U.S. at 32-33.

Petitioner relies heavily on the Court's decision in *United States* v. *Jackson,* 390 U.S. 570 (1968). The statute in that case, 18 U.S.C. §1201(a) allowed for the imposition of the death penalty in kidnapping cases only after a jury trial. It did not allow for the imposition of a capital sentence after a bench trial. The statute was held unconstitutional in that it impermissibly detered the defendant's right to demand a trial by jury. It appears that the holding in *Jackson* is limited to the statutes which on their face penalize the assertion of constitutional rights. (J.A. 93). This conclusion seems especially strong in light of this Court's opinions in *Brady* v. *United States,* 397 U.S. 742 (1974) and *North Carolina* v. *Alford,* 400 U.S. 25 (1970). *Brady* held that a guilty plea entered to avoid the death penalty under 18 U.S.C. §1201(a) was not invalid because it was entered to avoid the possibility of a death sentence. *Brady* v. *U.S.,* 397 U.S. at 755. Similarly in *Alford,* the Court held that "the Court of Appeals for the Fourth Circuit was in error to find Alford's plea of guilty invalid because it was made to avoid the possibility of the death penalty. *North Carolina* v. *Alford,* 402 U.S. at 39. The Court stated that a valid plea of guilty could be entered even though the defendant was unable or unwilling to admit guilt. *North Carolina* v. *Alford,* 400 U.S. at 37. The clear principle drawn from these cases is that the possibility of the death penalty

being imposed does not needlessly nor impermissibly chill a defendant's right to demand a trial by jury.

Similarly, it should be noted that this Court has rejected the argument that unrestricted jury resentencing has an impermissible "chilling effect" on a defendant's right to select a jury upon retrial. *Chaffin* v. *Stynchombe,* 412 U.S. at 33, footnote 21. The *Chaffin* Court further held that *Jackson* did not require a contrary result. 412 U.S. 32, footnote 20; 33, footnote 21. The majority recognized that the choice involved in deciding whether to forego a jury was based on "considerable speculation." The Court refused, therefore, to impinge on jury sentencing, a practice seen as both legitimate and valid state interest. *Chaffin* v. *Stynchombe,* 412 U.S. at 33, footnote 21.

The principles of *Chaffin* lead to the conclusion that the possibility that the second jury might impose a higher sentence does not impermissibly chill a defendant's right to trial by jury. *Chaffin* v. *Stynchombe,* 412 U.S. at 32-33. As the Court in *Chaffin* recognized, there is doubt that the possibility of a higher sentence does in fact "chill" most defendants, 412 U.S. at 32-34. This seems especially true in cases where the defendant faces the prospect of spending the next fifty years of his life in prison.

IV

The Issue Whether The Aggravating Circumstances Plead In This Cause Are Unduly Vague And Overbroad In Violation Of The Due Process Clause Of The XIV Amendment Is Not Final Within The Meaning Of 28 U.S.C. 1257 And The Court Would Therefore Act In Excess Of Its Jurisdiction If It Decided This Issue At This Time.

In The Alternative, Should This Court Decide This Issue, Respondent Asserts That The Aggravating Circumstances Plead In This Cause Are Not Unduly Vague And Oberbroad In Violation Of The XIV Amendment Of The United States Constitution.

A. Finality

This Court in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) reviewed the finality requirements of 28 U.S.C. §1257. The majority stated that there are at least four categories of cases in which the Court has treated the decisions on the federal issues involved as final judgments and assumed jurisdiction even through additional proceedings were still to be had in the state courts, 420 U.S. at 477. The Court noted that in almost all of these cases the additional proceedings would not require the decision of other federal questions by this Court at some later date, *420 U.S. at 477.*

The first category of cases require further proceedings at the state court level but the federal question is conclusive of the issues or the outcome of the proceedings are preordained, 420 U.S. at 479. The second group of cases involve federal questions, finally decided by the highest court in the state, which will survive and require a decision regardless of the outcome of the state proceedings. *420 U.S. at 480.* The third categaory involves cases where the federal question has been finally decided with further state proceedings to be had, but in which later review of the federal question cannot be had whatever the ultimate outcome of the case. *420 U.S. at 481.* The last category of cases are those where the federal question has been finally decided with further proceedings pending in which the party seeking review might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining an evidentary matter in the pending state proceedings. *420 U.S. at 481.*

A review of the case at bar reveals that it fails to fit into any of the categories enumerated in the *Cohn* decision. The federal

issue[25] in this case is not conclusive of the issues nor is the outcome of this case preordained, *420 U.S. at 479.* A capital murder trial will be had whether or not this issue is heard. Additionally, the verdict of the jury in the second trial can clearly not be said to be preordained. Thus, this "case is not for practical purposes concluded," *420 U.S. at 479.* Secondly, the federal issue will not necessarily survive regardless of the outcome of the proceedings. 420 U.S. at 480. If the defendant is acquitted or receives a life sentence at the second trial, this issue will become moot. Conversely, review of this issue will not necessarily be lost whatever the outcome of the case. 420 U.S. at 481. The issue can again be raised if the death penalty is imposed. It should be noted also, that this issue was not raised upon appeal by the state, thus the rationale of *California* v. *Stewart* is not applicable.[26] *California* v. *Stewart,* 384 U.S. 436 (1966). Lastly, it does not fall within the fourth category of cases mentioned in *Cohn* for the reason that a decision of this issue will not be preclusive of the cause of action, *420 U.S. at 483.* As pointed out earlier, a capital murder trial will ensue regardless of any decision the Court might reach on this issue. Therefore, this case does not fall within any of the principles of *Cohn.*

It has been concluded that it is not this Court's duty to discourage appeals. *Republic Natural Gas Company* v. *Oklahoma,* 344 U.S. 62, 71 (1947). On the other hand, the Court should not decide issues of constitutional dimension

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[25] For the purpose of this argument, the federal issue referred to is "whether or not the aggravating circumstances are unduly vague and overbroad and therefore unconstitutional." While respondent does not assert that the Double Jeopardy issues are not final for the purposes of appeal, it appears that the issues raised in Points of Petitioner's Brief also suffer from the same lack of finality.

[26] In *Stewart* the State of California sought a Writ of Certiorari after being denied a permanent writ of prohibition by the California Supreme Court. This Court granted Certiorari to preserve the federal issue involved.

before the proceedings have arrived at a definitive stop, *344 U.S. at 71.* The issue of whether the aggravating circumstances set out in §565.012 are unduly vague comes at a time prior to trial when it is clear that no definitive stopping point has been reached. See *Arceneaox* v. *Louisiana,* 376 U.S. 336 (1964). Moreover, in any criminal trial, the possibility looms large that further federal constitutional issues may arise. Thus, this Court may again be faced with deciding issues in this case. *Republic Natural Gas Company* v. *Oklahoma,* 344 U.S. at 71.

This Court has recognized that the finality requirement of 28 U.S.C. §1257 serves as a limitation on the review of state court decisions of constitutional issues so as to minimize federal intrusion in state affairs. *North Dakota State Board Of Pharmacy* v. *Snyder's Drug Stores, Inc.,* 414 U.S. 156, 159 (1973). As Justice Frankfurter stated for the majority in *Radio Station WOW* v. *Johnson,* 326 U.S. 120.

> This requirement (of finality) has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a state court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted to this Court the power to intervene in State litigation only after "the highest court of a state in which a decision in the suit could be had has rendered a final judgment or decree", 28 U.S.C. §344 (a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system, *326 U.S. at 124.*

This rationale is expecially applicable in this case when the potential for federal-state conflict is so strong. A full trial is yet to be had and the issue to be decided hinges upon a yet uninterpreted state statute addressing the sensitive topic of capital punishment. Thus, it appears that the best course of action in this case would be for this Court to defer making any decision until the Supreme Court of Missouri has had the opportunity to fully examine this question.

Six cases are not pending before the Missouri Supreme Court which involve the constitutionality of the language of 565.012.2 (17).[27] Unlike this case, these come to that court after a death sentence has been imposed. Recognizing that it is important in a federal system to give the state courts the first opportunity to decide the applicability of state statutes in light of constitutional challenges, it would be improvident for this Court to decide this issue. *Cardinale* v. *Louisiana,* 394 U.S. 437, 439 (1969). This seems especially so where the language to be interpreted has been held by this Court to be valid on its face. *Gregg* v. *Georgia,* 428 U.S. at 201. Admittedly, the Missouri Supreme Court, did, in cursory fashion, touch upon this issue in the underlying decision, although by petitioners own admission, it did not reach the "substantial history *et al*" language. That court was not however faced with a case where the death penalty had been imposed, thus thorough constitutional inspection was not needed.

The Abstention Doctrine, while not strictly applicable in this situation is instructive. This doctrine, founded on the "scrupulous regard for the rightful independence of the state government" and viewed as necessary "for the smooth working of the federal judiciary" has been employed by this Court in federal declaratory judgment suits to avoid unnecessary federal interference in state proceedings. *Railroad Commission Of*

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[27] *State* v. *Newlon,* No. 61798, *State* v. *McIlvoy,* No. 62026
State v. *Mercer,* No. 61797, *State* v. *Stokes,* No. 61963
State v. *Trimble,* No. 62523, *State* v. *Boulder,* No. 62362

Texas v. *Pullman Co.* 312 U.S. 496, 501 (1941). It has been held to be applicable to state criminal proceedings and thus in *Douglas* v. *City Of Jeanette,* 319 U.S. 157 (1943) it was stated:

> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its immenence, even though alleged to be in violation of constitutional guaranties, is not a ground of equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence, the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity are to be supported only on a showing of danger of irrepairable injury "both great and immediate." 319 U.S. at 163.164

Thus, this Court has recognized the desirability of allowing states to decide questions of state law. *Railroad Commission Of Texas* v. *Pullman Co.,* 312 U.S. at 496. Of course, this is not to say that the abstention doctrine is an automatic rule used whenever a federal court is faced with a difficult issue of state law. *Baggett* v. *Bullitt,* 377 U.S. 360, 375 (1964). It is not. The Court has however used the doctrine where the constitutional challenge hinges on the meaning of an unclear state statute and where the state court's construction of the statute might avoid the need for a ruling on the question or where it might change or alter the federal issue to be reviewed. *Harris County Commissioner's Court* v. *Moore,* 420 U.S. 77, 83 (1973).

This latter notion is of course consistent with the teachings of Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288 (1936). In that case, Mr. Justice Brandeis reviewed the self-imposed rules erected by the Court to avoid unnecessary constitutional adjudications and stated that the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Ashwander,* (Justice Brandeis, concurring) at 347. This rule seems especially pertinent in this situation where there is the possibility that the jury, by imposing a life sentence, may moot the question, thus making unnecessary a decision on the federal constitutional questions.

In conclusion, this final issue should not be addressed by this Court. First, there is not a final judgment within the meaning of 28 U.S.C. §1257. There is still an entire trial to be held in this lawsuit. Secondly, the decision on the constitutionality of this statute, should in the first instance, be given to the state courts. Not only would this alleviate unnecessary federal-state conflict, it might make unnecessary a federal decision on the issue.

B. Vagueness

Petitioner argues that the aggravating circumstances pleaded by the State of Missouri in this cause are facially vague and overbroad. RSMo §565.012. Those sections read in pertinent part:

> Statutory aggravating circumstances shall be limited to the following:
>
> (1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind:

A review of the decisions in *Gregg* v. *Georgia,* 428 U.S. 153 and *Godfrey* v. *Georgia,* 100 S. Ct. 1759 (1980) reveals that this contention is without merit.

This Court, in *Gregg,* reviewed statutory language very similiar to that found in RSMo 565.012(7).[28] In rejecting the argument that this language was facially vague, the Court stated:

> "It is, of course arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open ended construction. In only one case has it upheld a jury's decision to sentence a defendant to death when the only statutory aggravating circumstance was that of (27-2534.1(b)(7) and that homicide was a horrifying torture-murder." *Gregg* v. *Georgia* 428 U.S. at 201.[29]

The Gregg Court has thus explicitly ruled that such language is not unconstitutionally vague on its face. Rather, the Court has looked to the state supreme courts to impose narrow interpretations of such statutory wording.

The Court had the opportunity to again review the language of the Georgia statute in *Godfrey.* Here the majority succinctly stated the issue before the Court:

> The issue now before us is whether in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the §(b) (7) aggravating circumstances as to violate the Eighth and Fourteenth

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[28] Georgia Code Annotated 27-2534.1(b)(7) states "the offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. RSMo. §565.012.2 (7) does not include aggravated battery to the victim.

[29] The Court upheld similar statutory provisions in *Profitt* v. *Florida,* 428 U.S. 242, 255-256 (1976).

Amendments to the United States Constitution. *Godfrey* v. *Georgia,* 100 S.Ct. at 1762.

The Court went on to examine the facts of *Godfrey* in light of the other cases in Georgia where the Georgia Supreme Court had upheld the death penalty under §27-2534.1 (b) (7). *Godfrey* v. *Georgia,* 100 S.Ct. at 1766-1767. The Court stated that the Georgia Supreme Court had in the past recognized its duty to channel jury discretion by its review of any aggravating circumstances found at the sentencing stage of the trial. This duty the majority noted carried with it "the responsibility of keeping §(b) (7) within constitutional bounds," *Godfrey* v. *Georgia,* 100 S.Ct at 1765. The Court then found that the circumstances of *Godfrey* did not satisfy the criteria set out in other Georgia cases and that the Georgia courts had not limited §(b) (7) in the *present* case (emphasis added). The judgment of the Georgia Supreme Court was therefore reviewed insofar as it left standing the petitioner's death sentence. *Godfrey* v. *Georgia,* 100 S.Ct. at 1767.

It becomes evident after reading *Godfrey* that the majority did not hold the language of (b) (7) void for facial vagueness. Rather that decision, as shown above, looked to whether the aggravating circumstances in *that* particular case were vague as applied to the set of circumstances before the Court. The opinion was aimed not at the statute *per se,* rather it was aimed at the interpretations and application of the language by the Georgia Supreme Court. This being so, the opinion in *Godfrey* offers no credence to petitioner's argument and *Gregg,* therefore, is controlling.[30] Applying *Gregg* to the statute at bar there can be no doubt that the language of the Missouri provision is not void for facial vagueness given that it is almost identical to the Georgia provision upheld in *Gregg*.

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[30] This position is bolstered by the fact that this Court has denied certiorari in at least two cases where the death sentence imposed was based on 27-2534.1 (6) (7): *Burger* v. *State,* 265 SE2d 796 (1980) cert. denied 100 S.Ct. 2975 (1980). *Blake* v. *State* 260 SE.2d 876 (1979) cert. denied 100 S.Ct. 2974 (1980).

Petitioner next contends that the language of 565.012.2(1) is vague on its face. In the area of capital punishment statutes, this Court has judged impermissibly vague statutes by examining whether the law avoids standardless sentencing discretion and arbitrary and capricious infliction of the death penalty. *Gregg* v. *Georgia,* 428 U.S. at 196. As the Court in *Godfrey* stated, (citations omitted) "it must channel the sentencer's discretion by clear and objective standards that provide specific detailed guidance and that make rationally reviewable the process of imposing a sentence of death." 100 S.Ct. at 1764-1765.[31] Thus the standards cannot be so vague as to fail to "adequately channel" the sentencing authority's imposition of the death penalty, with a resulting pattern of arbitrary and capricious application of the capital sanction. *Gregg* v. *Georgia,* 428 U.S. at 195. See also *Furman* v. *Georgia,* 408 U.S. 310 (OPINION OF J. WHITE, CONCURRING.)

A review of the language of Mo. Rev. Stat. §565.012.2 (1) reveals that it meets the concerns of *Furman* by providing the jury "with objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death." *Woodson* v. *North Carolina,* 428 U.S. at 303. An examination of the statute shows that the language limits the jury's consideration to either a prior capital murder conviction or to serious assaultive criminal convictions. If serious assaultive criminal convictions are present, the jury must find a substantial history of these type offenses before a sentence of death can be imposed. This provides the jury with guidance and direction in determining whether this aggravating circumstance is present and it limits the type of conviction they may consider. See *Godfrey* v. *Georgia,* 100 S.Ct. at 1762, footnote 2. That this

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[31] See *Gregg* v. *Georgia,* 428 U.S. at 198, *Proffitt* v. *Florida,* 428 U.S. at 153 (Opinion of STEWART, POWELL & STEVENS, JJ.) and *Woodson* v. *North Carolina,* 428 U.S. at 303 (Opinion of STEWART, POWELL & STEVENS, JJ.) These cases are the basis of the Court's discussion in *Godfrey.*

section makes rationally reviewable the process for imposing a sentence of death cannot be questioned. The Missouri Supreme Court could, without any difficulty, compare the prior records of those defendants against whom the death penalty was imposed with the records of those who were given life sentences.

Petitioner's argument apparently is that the infinite number of possible combinations of serious assaultive convictions must be set out in the statute. This, however, misinterprets the meaning of *Gregg*. The majority in *Gregg* specifically noted that the enumerated aggravated circumstances are by necessity somewhat general. *Gregg* v. *Georgia,* 428 U.S. at 193-194. The Court, in spite of this, found that such language did provide guidance to the sentencing authority, thereby reducing the likelihood of arbitrary and capricious imposition of the death penalty. The Court also viewed the availability of meaningful appellate review as a further check against capricious imposition. As has been pointed out, the State of Missouri provides such review. Mo. Rev. Stat. §565.014. Moreover, petitioner's assertion ignores this Court's finding in *Godfrey* that almost identical language was *considerably* (emphasis added) more specific or objectively measurable than §(b) (7), which it held facially valid in *Gregg*. *Gregg* v. *Georgia,* 428 U.S. at 201, *Godfrey* v. *Georgia,* 100 S.Ct. at 1762, footnote 2.

As shown above, this particular aggravating circumstance without question meets the dictates of *Gregg*. Additionally, there exists no reason which would lead the Court to believe that the Missouri Supreme Court will adopt an open-ended construc-

tion at this provision.[32] *Gregg* v. *Georgia,* 428 U.S. at 201. Indeed, this Section does not lend itself to being a "catch-all provision" as was the case in the language examined in *Godfrey. Godfrey* v. *Georgia,* 100 S.Ct. at 1965. Thus, it is clear that petitioner's argument as to the facial vagueness of this provision is without merit.

CONCLUSION

WHEREFORE, for the foregoing reasons, the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

JAMES J. COOK
Assistant Prosecuting Attorney

HONORABLE GEORGE R. WESTFALL
Prosecuting Attorney
St. Louis County, Missouri

MARK A. MILLER
Assistant Prosecuting Attorney
7900 Carondelet
Clayton, Missouri 63105
(314) 889-2600

Attorneys for Respondent

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[32] Mention should be made of petitioner's attack on the Missouri Supreme Court's opinion concerning the issue of vagueness, (J.A. 94). The Court's reasoning, viewed by petitioner as being "confidently asserted," was, without question, sound. That Court relied on the statements of this Court in reaching its decision on a facial vagueness attack. It must be remembered that the Missouri Supreme Court was not faced with a case where the death penalty had been imposed. As has been pointed out, it is yet to decide a death penalty case.

APPENDIX

APPENDIX

Revised Statutes of Missouri, 1978

565.001. Capital murder defined.-Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

565.006. Verdict as to guilt when rendered-finding of guilt, effect of-presentence hearing, admissible evidence-penalty, when imposed-reversible error, effect of.-1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider consideration of punishment, and by their verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment, and by its verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense.

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible.

The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in section 565.012 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

3. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

565.012. Evidence to be considered in assessing punishment in capital murder cases.-1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence.

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence.

(3) Any mitigating or aggravating circumstances otherwise authorized by law, and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether

a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendnt was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

565.014. Supreme court to review all death sentences, notice, contents of-findings required—assistant to supreme court authorized, parties of.—1. Whenever the death penalty is posed in any case, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving the transcript, shall transmit the en record and transcript to the supreme court ether with a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the ofense, and the punishment prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Missouri.

2. The supreme court of Missouri shall consider the punishment as well as any errors enumerated by way of appeal.

3. With regard to the sentence, the supreme court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

4. Both the defendant and the state shall have the right to submit briefs within the time provided by the supreme court, and to present oral argument to the supreme court.

5. The supreme court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the supreme court of Missouri in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

6. There shall be an assistant to the supreme court, who shall be an attorney appointed by the supreme court and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital cases in which sentence was imposed after May 26, 1977, or such earlier date as the court may deem appropriate. The assistant shall provide the court with whatever extracted information the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant. The court shall be authorizied to employ an appropriate staff, within the limits of appropriations made for that purpose, and such methods to compile such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence. The office of the assistant to the supreme court shall be attached to the office of the clerk of the supreme court for administrative purposes.

7. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

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No. 79-6740

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT BULLINGTON,
Petitioner

v.

STATE OF MISSOURI,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

SUPPLEMENTAL BRIEF FOR THE RESPONDENT, STATE OF MISSOURI

JAMES J. COOK,
Assistant Prosecuting Attorney

HONORABLE GEORGE R. WESTFALL,
Prosecuting Attorney
St. Louis County, Missouri

MARK A. MILLER,
Assistant Prosecuting Attorney
7900 Carondelet
Clayton, Missouri 63105
(314) 889-2600

Attorneys for Respondent

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Comes now the Respondent, State of Missouri and files its Supplemental Brief pursuant to Rule 35.5 to analyze the present case in light of this Court's decision in United States v. DiFrancesco, ____U.S.____, 49 U.S.L.W. 4022 (1980).

This Court, in U.S. v. DiFrancesco, held it permissible for the Government to appeal sentences under 18 U.S.C. §3576. In rejecting the defendant's Double Jeopardy claim that the imposition of sentence is an implied acquittal of any greater sentence, the Court stated that there exists a fundamental difference between a sentence and an acquittal and accordingly recognized that a sentence did not possess the qualities of constitutional finality found in an acquittal. 49 U.S.L.W. at 2047. The Court, in reaching its conclusion, relied in part on the rule of North Carolina v. Pearce, 395 U.S. 711 (1969) that the propriety of an increased sentence on retrial is "a well-established part of our constitutional jurisprudence." Id at 4027, 395 U.S. at 720. SEE CHAFFIN v. STYNCHOMBE, 412 U.S. 17, 24 (1973).

Respondent does not contend that the decision in DiFrancesco is controlling of the situation at bar, however the principles enunciated are instructive. The Court here, as in DiFrancesco, is faced with the claim that the Double Jeopardy Clause gives the imposition of sentence a stamp of constitutional finality. As in DiFrancesco, this Court must reject such a proposition. The pronouncement of sentence has historically never carried the finality that attaches to an acquittal nor has this Court in any of its decisions ever adopted such a proposition. 49 U.S.L.W. at 4027. Indeed, this Court has held just the opposite. Id, NORTH CAROLINA v. PEARCE, 395 U.S. at 720, CHAFFIN v. STYNCHOMBE 412 U.S. at 24.

Similarly instructive is this Court's recognition in DiFrancesco that the imposition of sentence is not an "implicit acquittal" of any greater sentence. Id at 4027. This contention is however put forth by the petitioner in this cause. Petitioner contends that the imposition of a life sentence constitutes an acquittal of the greater sentence, death. SEE PETITIONER'S BRIEF at 16 et al. The rationale of DiFrancesco rejects such an approach. Petitioner's assertion that bifurcation and its adversarial nature differentiates this case from DiFrancesco is an "exaltation of form over substance which should be avoided."[1] Not only does this misinterpret the purpose of bifurcation, it seeks to extend Double Jeopardy finality to the imposition of sentence. SEE RESPONDENT'S BRIEF AT 12-13.

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1. While this Court in DiFrancesco did state that much of the sentencing is the result of non-adversarial inquiry, the Court did not state nor imply that sentencing is wholly non-adversarial. Id at 4028.

Respectfully submitted,

JAMES J. COOK,
Assistant Prosecuting Attorney

HONORABLE GEORGE R. WESTFALL,
Prosecuting Attorney
St. Louis County, Missouri

MARK A. MILLER,
Assistant Prosecuting Attorney
7900 Carondelet
Clayton, Missouri 63105
(314) 889-2600

Attorneys for Respondent.

This is to certify that a copy
of the foregoing was hand delivered
this 9th day of January, 1981 to
Richard H. Sindel, Attorney for
Petitioner, 15A N. Meramec, Suite 200
Clayton, Missouri 63105

Cornelia K. Parker